Supreme Court, U.S.
FILED
AUG 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-278

IN THE

Supreme Court of the United States

October Term, 1988

STANLEY FRIEDMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Whether a defendant may be forced to give up the right to a speedy trial or the right to be tried in the vicinage where the government pollutes the atmosphere of the vicinage with unlawful and prejudicial publicity.

Whether an error may be viewed as harmless in isolation or whether such error should be tested in the context of the entire case.

Whether a defendant has been afforded effective assistance of counsel where his attorney fails to cross-examine witnesses because of the attorney's conflict.

Whether a RICO conviction predicated on five predicate acts, one of which is a mail fraud, may stand where the mail fraud act is invalid and there is no evidence that the jury did not base its finding of a pattern of racketeering activity on the invalid charge.

Parties

All of the parties to the proceeding in the United States Court of Appeals for the Second Circuit were the petitioner, Stanley Friedman, and Michael Lazar, Lester Shafran, and Marvin Kaplan. None of the latter three is interested in this proceeding.

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OCTOBER TERM, 1988.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Opinions Below

A copy of the opinion of the United States Court of Appeals for the Second Circuit, decided June 14, 1988, is annexed hereto as an appendix; it has not yet been officially reported. Also annexed as appendices are three opinions of the District Court dated respectively May 29, 1986 (635 F.Supp. 782), June 19, 1986 (636 F.Supp. 462) and June 23, 1986 (638 F.Supp. 816).

Jurisdiction

(a) The judgment of conviction was rendered March 13, 1987, convicting petitioner of engaging in a pattern of racketeering activity in violation of 18 USC Section 1962(a) (Count I), conspiracy to violate the RICO statute, 18 USC Section 1962 (Count II) and two counts of mail fraud in violation of 18 USC Sections 1341 and 2 (Counts VI and IX), after a trial by jury on a fourth superseding indictment.

(b) The judgment of affirmance of the United States Court of Appeals for the Second Circuit is dated June 14, 1988 and was entered on June 14, 1988. The judgment has been withheld because of a stay of mandate, and no copy is available.

(c) Jurisdiction to review the judgment in question by certiorari is conferred by Title 28 USC Section 1254(1).

Constitution and Statutory Provision Involved

Amendment VI; Constitution Article 3, Section 2, Clause 3; Title 18 USC Section 1961, Subdivision 5; Title 18 USC Section 1962, Subdivision c; Title 18 Section 1962, Subdivision d; Title 28 Section 1254, Subdivision 1; Federal Rule of Criminal Procedure 6d; Federal Rule of Criminal Procedure 6e(2); Federal Rule of Criminal Procedure 18; Federal Rule of Evidence 806.

Statement of the Case

The Petitioner was convicted of racketeering crimes and mail fraud upon the basis mainly of the statements of Donald Manes, a suicide, whose hearsay testimony was mouthed by Geoffrey Lindenauer.

The claim of the government was that the defendants transformed the New York City Parking Violations Bureau ("PVB") from an agency of the City's Department of Transportation into a racketeering enterprise for the purpose of generating for themselves bribes and kickbacks.

The racketeering acts attributed to Friedman appeared in the indictment as Racketeering Acts Nos. Nine, Ten, Twenty, Twenty-One and Twenty-Two.

Racketeering Act 20 charged Friedman with conspiracy with Manes and Lindenauer to perpetrate a fraud upon the City of New York by depriving it of honesty in the running of its affairs, and in furtherance thereof, causing a letter from co-defendant Lester Shafran to be delivered by mail.

The other four racketeering acts charged Friedman with bribing Manes and Lindenauer, both public servants, with shares of stock in Citisources, Inc., a company that was controlled by Defendant Kaplan, whose companies were awarded contracts through the PVB; and with agreeing to bribe them with a percentage of monies to be earned under a contract with the PVB and with $30,000.00.

Beginning with the outset of the investigation in the matters which subsequently became the subject of the several indictments, and continuing through the various grand jury hearings, the media regularly proclaimed charges of corruption against the defendants and others.

The media in most instances claimed their sources of information were "law enforcement" persons or "federal law enforcement authorities" who leaked the information "on the condition that their names not be published".

Each superseding indictment was trumpeted in advances with publicity about what a grand jury was about to do. Evidence presented to the grand jury appeared in the media, including statements that witnesses had "taken the Fifth"; that other witness had admitted bribes, as to the evidence witness were expected to give, and references to which witnesses were "cooperating" and which had to be indicted and tried.

That all of this emanated from the Department of Justice was recognized by Judge Knapp, who found:

> "Indeed, unless the media was wholly irresponsible in continually asserting that the source of these revelations (evidence presented to the Grand Jury) was someone in the Department of Justice who was asking not to be identified, it may well be said that such improper disclosure has been established by the sheer number of newspaper articles citing such an authority in providing information that tuned out to be accurate." (*U.S. v. Friedman*, 635 F.Supp. 782, 785 (S.D.N.Y. 1986).

Judge Knapp held that he had no power to do anything about the publicity except grant a postponement or change of venue. He denied a motion for a severance.

Cross-Examination

The heart of the government's case against Friedman were statements allegedly made by Manes, who was dead at the time of trial. Lindenauer testified as to what the dead man told him about Friedman's involvement in a crooked scheme created by Lindenauer and Manes. Lindenauer said he learned from the deceased that Friedman was holding Citisource stock for Manes and Lindenauer, and this was a bribe.

Manes had, prior to his suicide, inflicted wounds upon himself and, when questioned by the police, told them that he had been abducted and knifed. He told the same story to an Assistant District Attorney. Two weeks later, after the police had been impelled by the Manes lies to conduct an investigation and a search for his assailants and could find no evidence to support the fabrication, Manes confessed that he had lied.

Friedman sought to inform the jury of Manes, lies by means of the testimony of the Assistant District Attorney to whom Manes had lied, and as well by a short videotape made of Manes as he admitted his lies.

The trial court excluded the testimony.

The Court of Appeals did not focus on the fact that Manes lied, but rather on the theory that his false abduction story had no conceivable bearing upon the credibility of his claimed statements to Lindenauer.

The Court of Appeals found that Judge Knapp properly exercised his "broad discretion" in denying Friedman the right to demonstrate Manes' lies.

The Court of Appeals also found no fault with the denial by Judge Knapp, in the exercise of his discretion, of the right to examine handwritten notes produced by Lindenauer's psychiatrist dealing with sessions held with Lindenauer by the psychiatrist from 1970 to 1984.

Friedman testified at the trial and denied the Manes story told by Lindenauer. The story was so fanciful that, according to Friedman, it emanated from a disturbed and psychotic mind. When he learned of the Lindenauer visits to a psychiatrist for more than 14 years, Friedman subpoenaed the appropriate records.

Judge Knapp found that a psychotherapist-patient relationship protected the records, and if there were no such relationship he would have exercised his discretion to keep the records out.

The Court of Appeals found that, if quashing the subpoena for the records might have been error, it was harmless error.

The Conflict of Friedman's Attorney

Friedman was represented by the law firm of Stroock & Stroock & Lavan with Thomas Puccio, of counsel, during all of the period from the filing of the indictment to the sentencing.

This counsel had represented Robert Richards, President of Citisources, when Richards testified before the SEC. Richards

testified at the trial and was offered by the prosecution as support for Lindenauer's testimony about conversations with the deceased Manes.

During the trial Puccio was negotiating on behalf of Melvin Lebetkin, an attorney who was being investigated for allegedly paying bribes to Manes and Lindenauer on behalf of another PVB vendor, the Standard Collection Agency. Puccio's relationship with Lebetkin had two branches: (1) he sought to keep Lebetkin from being indicted, and (2) he was trying to obtain for Lebetkin a large sum of money claimed to be owed by the City of New York. The latter relationship was not known to Friedman until after the trial when he received documents from the City of New York under the Freedom of Information Law.

The government had moved to disqualify Puccio because of his representation of Richards before the SEC and because of his representation of Lebetkin. However, the extent of Puccio's efforts for Lebetkin was set forth in sealed affidavits submitted by the government and Puccio. Friedman did not know the contents of those affidavits until the eve of sentencing. The government stated that, while representing Friedman, Puccio had attempted to gain immunity for Lebetkin by offering Lebetkin's testimony on the government's case.

The effect of the conflict is that Richards was not cross-examined with respect to perjury he committed before the SEC, and neither Lindenauer nor Sandow were cross-examined with respect to illegal enterprises in which they had entered with Lebetkin.

The Mail Fraud

The mail fraud counts charged the devising of a scheme to defaud the City of New York, its departments and the citizens of New York of their right "to the honest and loyal services" of Manes, Lindenauer and the Defendant Lester Shafran, as well as their right to have the City's affairs conducted honestly and free from fraud, corruption and the illegal receipt of bribes.

The government conceded that the mail fraud charges were required to be dismissed as the result of this Court's decision in *McNally v. United States,* 483 U.S. ____ 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

As part of the mail fraud charges the jury was permitted to hear evidence of what could only be characterized as crimes which had no relevance to any of the other acts which the government claimed to be predicate acts for RICO.

Reasons for Granting the Writ

I

The publicity loosed upon the community by the department of justice deprived Friedman of his constitutional right to be tried in the district in which the crimes were claimed to have been committed

The right of a defendant to be tried where the crime was committed was of such importance to the founders of our nation that they treated it in two separate provisions.

Article III, Section 2, of the Constitution requires that the Trial of all Crimes . . . shall be in the State where the said Crimes shall have been committed . . ."

In addition, the Sixth Amendment to the Constitution provides that "in all criminal prosecutions, the accused shall be entitled to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."

This Court has stated:

> "(q)uestions of venue in criminal cases . . . are not merely matters of formal legal procedure. They raise deep issues of public policy . . ." *United States v. Johnson,* 323 U.S. 273, 276, 65 S.Ct. 249, 251 89 L.Ed. 236.

The Sixth Amendment venue clause is enshrined alongside the provisions for a speedy trial, for confrontation with witnesses and for the assistance of counsel. It can hardly be said that the venue provision of that Amendment should be taken lightly.

The development of communications in our nation has altered it in ways undoubtedly unforeseen by the Founding Fathers. However, the constitutional safeguards enunciated by them for the protection of all who are charged with offenses are not to be disregarded to inflict merited punishment on some who are guilty (*Ex Parte Quirin, 1942, 63* S. Ct., 2, 317 U.S. 1, 87 L.Ed. 3).

Congress has also incorporated the basic constitutional protections in Rule 18 of the Federal Rules of Criminal Procedure which provides, in part, that "the prosecution shall be had in a district in which the offense was committed."

Prior to the trial, for an approximately eight-week period, there were at least 111 references in newspaper articles to leaks by the United States Attorney's office or the Justice Department. All of them apparently dealt with matters before the several Grand Juries.

Judge Knapp found that the disclosure by the government had been established by the sheer number of newspaper articles, citing someone in the Department of Justice who did not want to be identified and who provided information that turned out to be accurate.

The disclosures violated basic rules relating to Grand Jury secrecy. Rule 6(e) of the Federal Rules of Criminal Procedure provides that "an attorney for the government . . . shall not disclose matters occurring before the Grand Jury, except as otherwise provided for in these rules."

The Department of Justice Regulations, as they appear at 28 C.F.R. Section 50.2(b)(2), impose additional restrictions.

The Manual for United States Attorneys, issued by the Department, emphasizes the intent of the regulations. It states in pertinent part: "unless there are unusual circumstances news conferences should not be held to announce investigations, indictment or arrest."

Time and again this Court has taught that prejudicial publicity will result in a reversal where the activities of at least one party violate its undeviating rule. As Justice Holmes stated in *Patterson v. Colorado,* 205 U.S. 454, 462, 51 L.Ed. 879, 881, 27 S.Ct. 556 (1907):

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court and not by any outside influence, whether of private talk or public print."

In *Estes v. Texas,* 381 U.S. 532, 542, 543, 14 L.Ed.2d 543, 550, 85 S.Ct. 1628 (1965), this Court set aside a conviction without the showing of any prejudice, saying:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

When Judge Knapp found that the source of the spate of publicity was in all likelihood the Department of Justice, he made the fundamental error of deciding he could do nothing about it except to require of the Defendant Friedman that Friedman sacrifice a constitutional right.

Friedman had requested a severance because of the publicity, but that was denied. Armed with the knowledge of a flood of publicity let loose by the government in violation of the rules created to carry out the constitutional mandates, Judge Knapp stated:

> "We believe the government is correct in its assertion that a change of venue or postponement are the only judicial remedies for excessive publicity." (435 F.Supp. at p. 786).

The government's illegal publicity, according to the government and Judge Knapp, could only be dealt with if Friedman gave up one of two fundamental rights, both guaranteed by the Sixth Amendment.

He could give up his right to a speedy trial or he could waive his right to be tried in the district where the crimes were allegedly committed.

As with the trial judge in *Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507, Judge Knapp did not realize the extent of his power. This Court said of that trial judge:

> "The court's fundamental error is compounded by the holding it lacked power to control publicity about the trial."

Judge Knapp should have held a hearing, determined and fixed the responsibility for the heinous invasion of the Defendant's right to a fair trial and made public where that responsibility was and upon whose shoulder it rested. He could then have granted a severance or even dismissed the indictment, unless a trial could be held without the waiver or invasion of a fundamental right.

Whether the "leakers" in the Department of Justice had as their goal the intentional invasion of Friedman's rights, or whether that resulted from incompetence or indifference, the result is the same: Friedman was forced to relinquish a fundamental right.

The Court of Appeals could find no other basis than the fault of the Justice Department with which to deal with the publicity and therefore assumed *arguendo:*

> "that the government persistently leaked information about grand jury proceedings to the press in an unethical and unlawful campaign . . ."

It assumed, also, that the government violated Rule 7 of the Criminal Rules of the United States District Courts for the Southern and Eastern District of New York, which provides that a lawyer associated with a pending grand jury investigation should not go beyond the record.

The Court of Appeals, however, decided that *United States v. Mechanik*, 475 U.S. 66, 89 L.Ed.2d 50, 106 S.Ct. 938, prevented it from acting. It held that it was helpless to deal with the problem because of this Court's statement in *Mechanik* that "the supervening jury verdict made reversal of the indictment inappropriate."

In that case, two law enforcement officials appeared before a grand jury and were sworn together and questioned in tandem. While that violated Rules 6(d) of the Federal Rules of Criminal Procedure, no basic constitutional rights of the defendants were urged as being implicated. Counsel seemed content to rest on the theory of procedural irregularity.

If the general language of *Mechanik* is applied to this case and it is held that the conviction sterilizes the invasions of Friedman's rights, the two provisions of the Sixth Amendment and the right to be free from unfair publicity will be rendered meaningless.

The result would be happy-hunting licenses for prosecutors at all levels. A prosecutor could seek out his target, issue all kinds of illegal and mendacious propaganda and then wait for the trial in a poisoned atmosphere.

With a conviction in that case, the defendant could not ever object to the unfair publicity.

The Court of Appeals misconceived the *Mechanik* rule. It cannot be applied, as in the case at bar, where violations of fundamental and constitutional rights are concerned.

Denying a defendant the right to relief from the kind of invasion of his rights that occurred in the case at bar makes of his constitutional rights mere "pretend-rules", as Mr. Justice Marshall stated in his dissent in *Mechanik*.

Justice Marshall referred to *United States v. Borello*, 766 F.2d 46, 58 (2 Cir., 1985) which quoted Judge Jerome Frank's dissent in *U.S. v. Antarseli Fireworks Co.*, 155 F.2d 631, 661, (2d Cir.) cert. den. 329 U.S. 742, 67 S.Ct. 49, 91 L.Ed. 701 (1916). The latter case dealt with a prosecutor's improper appeal to a jury's prejudice in war time. Judge Frank said:

> "If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise, it will be as if we declared in effect, 'Government Attorneys' without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend rules."

The constitutional provisions for a fair trial in an unprejudiced atmosphere, the provisions for a speedy trial and the declaration of the right to be tried in the vicinage are not "pretend-rules". Our entire judicial system rests on the adherence to such provisions.

II

Friedman's right of confrontation was denied to him

The basic right of cross-examination was denied to Friedman by the Trial Court and by his own counsel. The court would not permit him to have access to Lindenauer's psychiatric records and would not permit the jury to learn that Manes was a liar and would lie about others to save his own skin.

Further, Friedman's trial counsel had conflicts of interest which prevented him from cross-examining witnesses.

The denial of access to Lindenauer's psychiatric records and the refusal to permit the demonstration of Manes' mendacity deprived Friedman of his right of confrontation

The psychotic and fanciful state of Lindenauer's mind was of prime importance in assessment by the jury of Lindenauer's credibility. He had had a long history of psychiatric treatment and had acted as a "therapist". During his role as a therapist he had had sex with at least four of his patients.

In *Barnes v. Jones,* 665 F.2d 427, 435, (reversed on other grounds sub. nom *Jones v. Barnes,* 463 U.S. 745, 77 L.Ed.2d 987, 103 S.Ct. 3308 (1983)) the Second Circuit approved the holding of the New York State Court of Appeals in *People v. Rensing,* 14 N.Y.2d 210, 250 N.Y.S.2d 401, and said:

> ". . . evidence relevant to a complainant's mental condition may be admissible on the issue of credibility . . ."

In the case at bar, Lindenauer had been under psychiatric care from 1970 to as recently as 1984, covering a good period of time when the allegedly illegal acts were occurring.

The relevance of such testimony is so clear that in *Barnes* the Second Circuit Court of Appeals took a lawyer to task because it said (665 F.2d at p. 427):

> "Beyond this, trial counsel erred in not presenting an offer of proof of the relevance of psychiatric evidence indicating the complainant's history of 'blacking out'. His omission left unchallengeable the trial court's ruling that such evidence was improper . . ."

The Court of Appeals in this case, however, arrogated to itself the role of Friedman's counsel. It determined that the psy-

chiatrist's notes contained "little, if any, material that would have been useful in cross-examining Lindenauer."

What is now codified in Title 18 U.S.C. Section 3500, "Jencks" material, had its birth in *Jencks v. United States*, 353 U.S. 657, 1 L.Ed.2d 1403, 77 S.Ct. 1007 (1956), where this Court stated (353 U.S. at p. 668):

> "The practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused is disapproved."

Not having seen the Lindenauer psychiatric reports, counsel for Friedman is still not taking a wild chance in stating that they dealt with Lindenauer's mental condition during a relevant period.

The Court in *Jencks* held without hesitation (353 U.S. at pp. 668, 669):

> "We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

Lindenauer, with a history of psychiatric involvement, was permitted to give lengthy testimony about conversations with someone who had died. It almost defies comprehension that his psychiatric records would be denied to defense counsel for them to decide whether they could be useful on cross-examination.

The trial judge compounded the error of denial of the right of confrontation by refusing to permit the testimony of Manes' lies and admission of lies.

Each of the statements, attributed by Lindenauer to Manes, which involved Friedman in criminal activity was denied by Friedman under oath and subject to a rigorous cross-examination by the prosecution.

Manes was not, and could not be, cross-examined. Yet it was his word against Friedman's.

Federal Rule of Evidence 806 clearly contemplated that the credibility of a declarant was subject to attack by demonstrating his lies.

Manes, although dead, was a witness. The Notes of the Advisory Committee on Proposed Rules show:

> "The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had testified."

Friedman argued in the Court of Appeals that this Court's decision in *Delaware v. Van Arsdall*, 475 U.S. 673, 90 L.Ed.2d 674, 106 S.Ct. 1431, provided the judicial interpretation of the Confrontation Clause to justify the demonstration of Manes' lying to avoid unpleasantness. This Court said (475 U.S. at p. 480):

> "While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole (citing case), the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontations right has been violated must be on the particular witness, not on the outcome of the entire case."

• • •

> "A reasonable jury might have received a significantly different impression of Fleetwood's credibility had respondent's counsel been permitted to pursue his prepared line of cross-examination."

A reasonable jury might well have viewed Manes' testimony differently had they been apprised of his lies.

The demonstration that Manes lied on a previous occasion was appropriate and proper. In *United States v. Fortes*, 619 F.2d 108, 118 (1st Cir., 1980) the Court said:

> "A witness' response to a question whether he told the truth on a previous occasion could well be probative of his character for truthfulness or untruthfulness. Cf. tigges, *supra*, at 939 n.3. And, when a case turns to a large extent on the credibility of the defendant's accuser, broad cross-examination of that principal witness should be allowed."

All the more should broad evidence be allowed where the accuser died and was not available to be cross-examined.

Considering that the restriction on the demonstration of Manes' perfity and lying might be subject to the harmless error rule, the harmless-error rule may not be applied in a vacuum. Friedman's entire defense, other than his own testimony, was blocked.

The denial to Friedman of the psychiatric reports relating to Lindenauer was treated by the Court of Appeals as harmless. The denial of the demonstration that Manes lied to officials on the very investigation which resulted in this case was found by the Court of Appeals to be proper, and Friedman's objections fanciful.

The characterizations by the Court of Appeals, considered in the light of the conflicts of interest of Friedman's attorney,

demonstrate that the result of all of the rulings made a harmful error of the denial of the opportunity to prove Manes' lies.

Friedman's right to cross examination was further burdened by his attorney's ineffective assistance which stemmed from the attorney's conflicts of interest

The ostensible excuse for the failure to cross-examine Richards rests on the statement made by Judge Knapp. He said that cross-examining Richards on that subject would "open the floodgates" to a redirect examination in which Richards might testify he perjured himself because of implied threats allegedly made by Friedman through a lawyer who represented co-defendant Lazar at the trial.

Friedman did submit an affidavit in which he said that he had waived the benefit of the conflict. However, the full impact of Puccio's conflict was not known to him at the time.

It beggars the imagination to state that a defendant, even a lawyer, would waive his own lawyer's conflict if he knew that his lawyer was offering evidence in favor of the government in a RICO conspiracy trial. That is precisely what Puccio was doing, according to the government's sealed affidavit.

Many reasons suggest themselves for Puccio's failure to demonstrate Richards' perjury, not the least of which is the extent of the knowledge of Richards' lawyers while the perjury was being committed.

Many reasons suggest themselves for Puccio's failure to show the extent of the criminal activities engaged in by Lindenauer and Sandow with Lebetkin. Although the evidence would certainly have had bearing on Lindenauer's credibility, it would also have hurt Lebetkin. Clearly, demonstrating Lebetkin's criminal activity might have resulted in his disbarment and, probably more important to Puccio's firm, might have adversely affected the fee it was charging for its efforts in settling the Lebetkin claims with the City.

Friedman learned that trial testimony in his case was submitted to the City of New York within two days after the conclusion of Sandow's trial testimony. Sandow was not even examined by Puccio with respect to the Lindenauer—Lebetkin —Sandow criminal acts.

The result of Puccio's activity for Lebetkin was that the latter and/or his company, Standard Collections Agency, received $757,731.00 from the City of New York. The City's claims against Lebetkin were settled for $210,000.00, leaving Lebetkin with a net gain after the settlement in excess of $500,000.00. The latter figure may be lessened by the fee charged Lebetkin by Puccio's firm. That figure is not available.

In addition to Puccio's reluctance to cross-examine his own clients, he was hampered by having been taped by the government surreptitiously and forced to forego cross-examination of Dr. Jerome Driesen or become a witness.

Driesen was cooperating with the government and had permitted himself to be taped in a conversation he had with Puccio and another attorney, Howard Borg. Puccio had been seeking information with which to impeach Lindenauer and had been told that Driesen, a forensic psychiatrist and long-time friend and accomplice of Lindenauer, believed Lindenauer to be mentally unbalanced. Puccio had also represented Borg at one time.

Driesen, according to the government, was a witness harmful to Friedman. When Puccio learned of the taping after jury selection began he objected then, and again when Driesen's testimony was offered. He said he was incensed that he was being taped and probably being "set-up" and objected for the further reason that his conflict of interest prevented him from cross-examining Driesen about the lies he told at the taped meeting.

Judge Knapp concluded that even if Driesen would lie, while acting for the government, that fact would affect his credibility, but only to a "piddling" degree.

The government and the Court of Appeals have rested on Friedman's affidavit and consent to waive Puccio's conflict with respect to Richards. No waiver was sought or obtained with respect to the Driesen-Borg-Puccio affair or with respect to the information in the sealed affidavit or with respect to the Lebetkin negotiating.

The Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him". Cross-examination is of primary concern in the articulation of that constitutional protection.

> "Our cases construing the (confrontations clause) hold that a primary interest secured by it is the right of cross-examination" (*Douglas v. Alabama,* 380 U.S. 415, 418, 13 L. Ed.2d 934, 85 S.Ct. 1074 (1965)).

The selection of a defense counsel certainly does not give such counsel the right to jeopardize his client's right to cross-examine by virtue of his own intent or conflict of interest.

> "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (*Woods v. Georgia* 450 U.S. 261, 269, 67 L.Ed.2d 220, 230, 101 S.Ct. 1097, (1981)).

For Friedman to have waived the conflict, the Trial Judge should have first followed the procedure established by the Second Circuit Court of Appeals in *United States v. Iorizzo* 786 F.2d 52, 56 (1986) on the basis of its earlier decisions cited in *Iorizzo:*

> ". . . the trial court should: (i) advise the defendant of the danger arising from the particular conflict; (ii) determine through questions that are likely to be answered in narrative form whether the defendant understands those risks and freely chooses to run them, and (iii) give the defendant time to digest and contemplate the risks after encouraging him or her to seek advice from independent counsel".

Friedman did seek advice from outside counsel.

The Court of Appeals added to that fact his being a lawyer and his presence in court at a hearing and concluded that, in addition to waiving the conflict danger, Friedman had waived the very procedure created by the courts to guarantee that a defendant's waiver was appropriate and informed.

Of major concern in that regard is that Friedman did not know that Puccio had offered to the government Lebetkin's testimony in return for Lebetkin's immunity.

At that time, in addition, Puccio knew that he had a financial interest in refraining from embarrassing Lebetkin's claim against the City of New York. Friedman did not know of such interest.

Friedman's waiver of the conflict of his counsel was certainly made on less than all of the facts. It certainly cannot be characterized as "an intelligent and competent waiver by an accused" of a constitutional right to a conflict free attorney.

> "In *Von Moltke v. Gillies,* 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), Justice Black joined by Douglas, Murphy and Rutledge, JJ., observed:
>
> A waiver of the constitutional right to the assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial. * * * 'The constitutional right of an ac-

> cused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused, [quoting from *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461]. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand."

Had Judge Knapp conducted the kind of inquiry requested of him, he himself would have developed the information or ruled against Puccio continuing as counsel.

The constellation of circumstances, comprising the denial of the opportunity to impeach the Manes statements by showing his lies, the denial of the right to explore the psychiatric history of Lindenauer and the failure of Puccio to overcome his own conflicts and cross-examine in favor of Friedman, made a farce of Friedman's right of confrontation and a farce of the defense.

III

The court's decision in *McNally v. United States* mandates denial of the conviction of Friedman

The mail fraud charge against Friedman was listed as one among five racketeering acts as the predicates for the RICO charges.

Racketeering Acts 9 and 10 dealt with the bribery of both Manes and Lindenauer by means of Citisource stock. They obviously constituted one transaction, and that would leave a total of four Predicate Acts. One of the Acts, the claimed mail fraud, is now concededly not a Predicate Act.

Whether four or five acts, in considering the culpability of Friedman the jury was given a vast number of details in support of the mail fraud charge it would not otherwise have received.

The racketeering charge (18 U.S.C. Section 1962a) and the racketeering conspiracy charge (18 U.S.C. Section 1962d) required a pattern of racketeering activity. Concededly, a pattern of racketeering activity requires *at least* two predicate racketeering acts.

That does not mean that the existence of two racketeering acts automatically results in the conclusion that a pattern exists. Judge Knapp correctly charged the jury that they must find, with respect to the racketeering acts (A966):

> "In other words, it's not enough that he did it, its got to be proved beyond a reasonable doubt that, having done it was in furtherance, in connection rather, with the affairs of the conduct of the PVB.
>
> 'And, two, that at least two of these same proven racketeering acts were related to each other by a common scheme, plan or purpose, so that they can fairly be characterized as part of a larger pattern of activity.' "

In other words, there could have been fifty charges of predicate acts and the jury could have found Friedman guilty of all of them and still not have concluded that these acts were part of a common plan or scheme to have formed a pattern of racketeering activity.

So, in the case at bar, the jury considered that Friedman had committed the five acts charged. However, there is nothing anywhere to indicate which of the acts the jury found were so connected as to constitute the two necessary to form the pattern.

While one may not speculate, at least one court took the position that under such circumstances, that is, where a predicate act was found to have been improper, and possibly considered as a triggering act, the conviction of RICO should be set aside.

In *U.S. v. Brown*, 583 F.2d 659, 669 (A 3 1978) cert. denied 440 U.S. 909, 59 L.Ed.2d 456, 99 S.Ct. 1217 (1979) the Third Circuit reversed two defendants' RICO convictions when two of their four convictions for predicate acts were found to be involved.

(See dissenting opinion of Justice White with whom Justice Brennan joined in *McCulloch v. Jones*, ____ U.S. ____, 99 L.Ed.2d 364 [Nov 9, 1987].)

The Court of Appeals in the case at bar said that the count of mail fraud was merely one of twenty-five predicate acts and thus its elimination would not have affected the trial strategy and the defendants suffered no prejudice by reason thereof. It overlooked the fact that Friedman was charged with much fewer than twenty-five acts.

The prejudice is clear. One may not speculate whether the mail fraud charge against Friedman was deemed by the jury to have been the glue that held together the pattern of racketeering activity.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A—Opinion of United States Court of Appeals, Second Circuit, Decided June 14, 1988

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT

Nos. 107, 108, 109, 110 (Argued September 17, 1987) — August Term, 1987 Decided June 14, 1988

Docket Nos. 87-1134, 87-1137. 87-1138, 87-1139

UNITED STATES OF AMERICA,

Appellee,

v.

STANLEY FRIEDMAN, MICHAEL LAZAR, LESTER SHAFRAN, and MARVIN KAPLAN,

Defendants-Appellants.

Before:

CARDAMONE, WINTER and PRATT, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Southern District of New York (Whitman Knapp, *Judge*) convicting appellants of mail fraud, perjury, racketeering and conspiracy to engage in racketeering. The charges stem from defendants' participation in a scheme to operate the New

York City Parking Violations Bureau as a racketeering enterprise. The government concedes that we must vacate the mail fraud convictions in light of *McNally v. United States*, 107 S. Ct. 2875 (1987). We reserve decision on Kaplan's RICO convictions pending the in banc review of an unrelated case concerning the meaning of a pattern of racketeering activity under RICO. In all other respects, however, we affirm.

ALAN M. DERSHOWITZ, Cambridge, Massachusetts (Nathan Z. Dershowitz, Victoria B. Eiger, Dershowitz & Eiger, New York, New York, of counsel), for Defendant-Appellant Stanley Friedman.

MARVIN E. FRANKEL, New York, New York (Debora K. Grobman, Jonathan L. Polkes, Lisa E. Davis, Kramer, Levin, Nessen Kamin & Frankel,. New York, New York, of counsel), for Defendant-Appellant Michael Lazar.

LARRY J. SILVERMAN, New York, New York (Shira A. Scheindlin, Cynthia R. Finn, Scott Francis, Budd Larner Gross Picillo Rosenbaum Greenberg & Sade, New York, New York, of counsel), for Defendant-Appellant Lester Shafran.

GERALD B. LEFCOURT, New York, New York (Walter P. Loughlin, Newark, New Jersey, Joshua L. Dratel, Erica Horwitz, New York, New York, of counsel), for Defendant-Appellant Marvin Kaplan.

STUART E. ABRAMS, Assistant United States Attorney for the Southern District of New York, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, William J. Schwartz, Bruce A. Green, Assistant United States Attorneys for the Southern District of New York, New York, New York, of counsel), for Appellee.

Arthur Eisenberg, New York, New York, for Amicus Curiae New York Civil Liberties Union.

WINTER, Circuit Judge:

The New York City Parking Violations Bureau ("PVB"), an agency of the City's Department of Transportation ("DOT") collects parking fines. But the jury in this case found that the PVB was also used to collect bribes and kickbacks and had become a cesspool of corruption. It found that appellants Stanley Friedman, Michael Lazar, Lester Shafran and Marvin Kaplan had participated in the operation of the PVB as a racketeering enterprise, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, 1962(c), (d) (1982 & Supp. IV 1986). The jury convicted each appellant of racketeering, conspiracy to engage in racketeering, and mail fraud. In addition, Kaplan was convicted of having perjured himself in testimony before the Securities and Exchange Commission about bribes relating to this case.

Appellants raise a host of issues. Shafran and Kaplan contend that the government's evidence was insufficient to prove certain of the charges against them. Lazar contends that the evidence demonstrated multiple conspiracies rather than the single conspiracy charged in the indictment. Lazar and Shafran contend that the district court erred in denying their requests for severance. Kaplan contends that his convictions should be reversed because some of the testimony against him was "purchased" by a grant of immunity amounting to "an invitation to perjury"; that his RICO convictions should be reversed because his alleged bribery of two public officials constituted a single criminal transaction under New York law and therefore was only one predicate act under RICO; and that even if he was properly found to have committed two predicate acts, these acts did not constitute a "pattern of racketeering activity." Friedman contends that his attorney's alleged conflicts of interest denied him the effective assistance of counsel; that he was prejudiced by erroneous evidentiary rulings; and that he was further prejudiced by the district court's publicly- reported belief that he had told a "highly improbable story" on the witness stand. Finally, all appellants contend that the indictment should have been dismissed because the government repeatedly violated Fed. R. Crim. P. 6(e) by generating extensive publicity

through leaking information concerning the grand jury proceedings.

We vacate the mail fraud convictions in light of the government's concession that McNally v. United States, 107 S. Ct. 2875 (1987), requires us to do so. In addition, we reserve decision of Kaplan's RICO convictions pending in banc review of issues in an unrelated case concerning the meaning of a "pattern of racketeering activity." The remaining convictions, however, are affirmed. Given the length of the trial, the complexity of the issues, and the vigor with which it was prosecuted and defended, Judge Knapp conducted a remarkably fair and error-free trial.

BACKGROUND

A. *The Indictment and the Proceedings Below*

Appellants were tried on a fourth superseding indicted, Indictment SSSS 86 Cr. 259 (WK), filed in the Southern District of New York on September 10, 1986. The indictment contained ten counts. Count One charged that appellants, along with unindicted "co-racketeers" Donald Manes and Geoffrey Lindenauer, and defendant Marvin Bergman (who was severed at the close of the government's case), had conducted and participated in the affairs of an enterprise—the PVB—through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c). Count Two charged the same individuals with having conspired to conduct and participate in the affairs of the PVB through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(d). In support of Counts One and Two, the indictment alleged that the general object of the racketeering activity was "to transform the PVB from a public agency devoted to the performance of public services . . . into a vehicle for the corrupt profit of county leaders, public officials, private businesses and private businessmen."

The RICO counts charged appellants with twenty-two predicate acts of racketeering. Friedman was charged in four rack-

eteering acts (Nos. Nine, Ten, Twenty-One and Twenty-Two) with having bribed Manes and Lindenauer on behalf of two PVB contractors, Citisource and Datacom, and in one racketeering act (No. Twenty) with having committed mail fraud in violation of 18 U.S.C. §1341 (1982) by facilitating a bribery scheme on behalf of another contractor, the Bernard Joint Venture. Lazar was charged in three racketeering acts (Nos. One, Two and Three) with having bribed Manes and Lindenhauer on behalf of two PVB contractors, Datacom and Miller & Rothman, and in one racketeering act (No. Four) with bribing Shafran by providing him with the opportunity to invest in a parcel of commercial real estate, the Candler Building, on behalf of a PVB contractor, Datacom. Three other racketeering acts (Nos. Six, Seven and Eight), which charged Lazar with having committed bribery to increase the value of the Candler Building, were dismissed before trial. Shafran was charged in ten racketeering acts (No. Five, and Nos. Eleven through Nineteen) with having accepted, in violation of New York law, the alleged real-estate bribe from Lazar and a series of other bribes from two PVB contractors, Systematic Recovery Services and the Bernard Joint Venture. Finally, Kaplan was charged in two racketeering acts (Nos. Nine and Ten) with having bribed Manes and Lindenauer on behalf of one of his own firms, Citisource.

Count Seven charged Kaplan with perjury in his testimony before the SEC, in violation of 18 U.S.C. §1621 (1982). The remainder of the indictment was devoted to bribery-related charges of mail fraud involving various permutations of defendants and contractors and essentially tracking the predicate acts detailed above.

At the request of the defendants, Judge Knapp conducted the trial in New Haven, Connecticut with jurors from the Hartford area. *See* Fed. R. Crim. P. 21. The trial lasted just over nine weeks. The jury convicted Friedman, Lazar, Shafran and Kaplan on Counts One and Two, the racketeering and racketeering conspiracy charges. Friedman and Kaplan were found guilty of all of the racketeering acts with which they were charged. Lazar was found guilty of the three racketeering acts (Nos. One, Two and Three) that charged him with having

bribed Lindenauer; he was found not guilty, however, of the racketeering act (No. Four) involving his alleged bribery of Shafran by means of an investment in the Candler Building. The jury found Shafran guilty of six (Nos. Twelve and Fourteen, and Nos. Sixteen throught Nineteen) of the ten racketeering acts with which he was charged; he was found not guilty of having taken the alleged Candler Building bribe from Lazar (No. Five) and of three (Nos. Eleven, Thirteen and Fifteen) of the eight racketeering acts that charged him with accepting bribes from the Systematic Recovery Services. In addition, the jury disposed of the mail fraud counts in a fashion consistent with its findings as to the RICO predicate acts, returning verdicts of guilty on each count save for Count Five, which charged both Lazar and Shafran with mail fraud in connection with the alleged Candler Building bribe. Finally, the jury convicted Kaplan of perjury.

Friedman received a twelve-year sentence of imprisonment, to be followed by five years' probation, and was required under 18 U.S.C. §1963 (1982) to forfeit 167,500 shares of stock in Citisource, a firm that the jury found had enlisted Friedman to pay bribes. Lazar received three years' imprisonment and a fine of $200,000, and was required to forfeit $45,000. Kaplan received four years' imprisonment and a fine of $250,000, and, like Friedman, was required to forfeit his 90,000 shares of Citisource. And Shafran, whom the district court considered "the least culpable" of the defendants, was sentenced to six months' imprisonment to be followed by five years' probation. Finally, each defendant was required to pay a special assessment as required by 18 U.S.C. §3013 (Supp. IV 1986).

B. *The Government's Proof*

In light of the jury's verdict, we view the evidence in the light most favorable to the government.

1. *The Politicians and the PVB*

A central figure in the pervasive corruption of the PVB was Donald Manes, a major figure in New York City politics until

his suicide in the spring of 1986. During the 1960's, Manes served as a New York City Councilman from Queens. He was elected Queens Borough President in 1971 and became Chairman of the Queens Democratic Committee in 1974. Manes's accession to the borough presidency and party chairmanship, posts which he held until 1986, made him one of the most powerful of New York City's politicians. As Borough President, Manes sat on the New York City Board of Estimate, the body that negotiates and approves all City contracts. As leader of the Queens Democratic Party, he controlled the distribution of substantial patronage in City government.

While serving as a City Councilman, Manes established friendships with defendants Michael Lazar and Stanley Friedman. Lazar, like Manes, was a Councilman from Queens. Friedman served as counsel to the Majority Leader of the City Council. During this period, Manes also met Geoffrey Lindenauer, a key witness for the the government in this case and a remarkably decadent and corrupt person. Lindenauer falsely claimed to hold a Doctor of Philosophy and operated a sham psychotherapy institute with the help of his mother. The institute was unprofitable financially, but Lindenauer used it as a way of having sex with his patients. The institute failed in 1974, but only after Manes had loaned Lindenauer $25,000 to purchase the portion of the institute owned by Lindenauer's mother.

During the next two years, Manes unsuccessfully attempted to find work for Lindenauer. In 1976, Manes introduced Lindenauer to Stanley Friedman. Friedman, then Deputy Mayor, secured for Lindenauer a patronage job in the City's Addiction Services Agency, a position from which he was fired approximately one year later. Manes then secured another patronage job for Lindenauer, this time an assistant directorship in the PVB. Manes warned Lindenauer that if he lost the PVB job, there would not be a third. Thus chastened, Lindenauer became an upwardly mobile City bureaucrat, gaining promotion to the second-highest position in the PVB, Deputy Director.

Meanwhile, Michael Lazar was rising in political prominence. In 1971, he was appointed Chairman of the City's Taxi and Limousine Commission. In 1974, he became Administra-

tor of the DOT, the parent agency of the PVB. After leaving City government in 1976, Lazar remained active in Democratic Party politics, becoming a member of the Finance Council of the Democratic National Committee. Taking full advantage of his political ties, Lazar prospered as an attorney, lobbyist and developer. His political protege was defendant Lester Shafran, a former associate in Manes's law office and a former Assistant District Attorney in Queens. When Lazar served as Chairman of the Taxi and Limousine Commission, he appointed Shafran to be the Commission's Assistant General Counsel. When Lazar later became Administrator of the DOT, he appointed Shafran to serve as the DOT's Inspector General, thereby making Shafran responsible for investigating corruption in the DOT. After Lazar left the DOT in 1976, Lazar's friend Manes helped Shafran obtain an appointment as Deputy Commissioner of the DOT and Director of the PVB.

The PVB retains private contractors to perform a variety of tasks. For example, the PVB has contracted with private firms to perform data-processing services, to redesign its computer system and to perform keypunching for the entry of parking-violation data into its data-processing system. The PVB also awards contracts to private collection agencies for the collection of parking tickets. Thus, if the PVB is unable to collect a parking summons issued to a vehicle registered in New York, it will assign the task of collecting the summons to a "first placement agency," working on a commission basis. If the first placement agency fails to collect the summons, the PVB reassigns the summons to a "second placement agency." Second placement agencies receive higher commissions than first placement agencies. The PVB also awards contracts for the collection of summonses issued to rental cars and to cars registered outside New York. The PVB's collections serve as an important source of revenue for New York City.

2. *Datacom Systems Corporation*

In 1975, a data-processing firm, Datacom Systems Corporation, contracted with the PVB to collect summonses issued to vehicles registered outside New York. Datacom developed a

successful program for towing such vehicles found in New York City. In 1978, Datacom retained Lazar to assist in its dealings with City agencies and with other agencies throughout the nation. Lazar initially received a montly retainer of $500 from Datacom.

Datacom received very favorable treatment from the PVB during the late 1970's and early 1980's. In 1979 Datacom signed a new contract with the PVB for first-placement collection work. Shafran, a close friend of Datacom's vice president, Neal Anderson, was instrumental in ensuring Datacom's success. In 1979, however, Lindenauer began to complain to both his superior, Shafran, and his patron, Manes, that the PVB was failing properly to monitor Datacom. Shafran repeatedly dismissed Lindenauer's protests. Lindenauer nevertheless lodged complaints with Anderson and Datacom's president, Joseph Delario, and caused the delay of collection assignments to Datacom. Delario became upset at Lindenauer's behavior, and, knowing that Lindenauer was a Queens political appointee, Delario and Anderson sought help from their Queens political consultant, Lazar. In turn, Lazar sought out Manes, who suggested that bribery was the solution to Datacom's difficulties with Lindenauer.

Accordingly, Manes told Lindenauer in late 1979 that Datacom was unhappy with Lindenauer, but that if Lindenauer would assist Datacom in obtaining a new contract, the company would give Lazar $500 every month to pay to Lindenauer. Manes proposed that Lindenauer repay Lindenauer's debt to Manes with some of this money. Manes also told Lindenauer not to let Lazar know that some of the money would go to Manes. The first bribe was paid one week later, when Lindenauer visited Lazar's home in Queens. After telling Lindenauer that he should cooperate with Datacom and ensure that the firm received business from the PVB, Lazar handed Lindenauer an envelope containing $500. Lazar delivered payments to Lindenauer from late 1979 through most of 1982. The bribes were supposed to be paid monthly, but Lazar often failed to pay on time. Lindenauer's treatment of Datacom varied accordingly. Between 1979 and 1982, Manes persuaded Lazar to increase the payments to as much as $2,000. At trial,

Lindenauer estimated that he had received approximately $30,000 in bribes from Lazar, and that he had turned over $17,000 to Manes.

Although Datacom's president, Delario, knew of Lazar's payments to Lindenauer, Delario never gave Lazar money expressly for this purpose. Instead, Delario rewarded Lazar through generous increases in his retainer. Lazar's monthly fee reached the sum of $10,000 by mid 1982. By that time, Lazar had received a total of $300,000 in fees from Datacom. However, Lazar complained to Datacom about having to pay Lindenauer from his own pocket and about having to pay taxes on money given to Lindenauer. Tensions between Lazar and Datacom mounted, finally resulting in an angry confrontation between Delario and Lazar in which Delario terminated Datacom's relationship with Lazar.

3. *Miller & Rothman*

In the middle of 1981, while he was still working for Datacom, Lazar told Lindenauer that he hoped to form his own collection firm. Lazar proposed that if Lindenauer helped the new agency obtain a second-placement contract with the PVB, Lazar would make Lindenauer and Manes silent partners in the new firm. Lindenauer and Manes agreed, and Lazar contacted Barry Miller, a lawyer with whom he was acquainted, to suggest that he and Miller form the collection firm. Lazar told Miller that the new firm could obtain business from the PVB through Lazar's "friends," Lindenauer and Shafran. Miller agreed to become half-owner of the new agency. Lazar gave a five-percent share of the new agency to Allen Rothman, an associate in Lazar's law firm who was to perform legal work for the new agency. Lazar kept the remaining forty-five percent of the new firm for himself, Lindenauer and Manes. At the same time, however, Lazar concealed his participation in the firm, fearing that revelation of this interest would attract public scrutiny. He thus made certain that his name did not appear in the company's records, and he styled the firm Miller & Rothman. Miller & Rothman's certificate of incorporation did not list Lazar as a shareholder.

Miller & Rothman submitted a proposal for a second-placement contract in late 1981. In his effort to help the firm obtain a contract, Lindenauer met with Miller, Rothman and Lazar at Lazar's beach house. Lindenauer thereafter both assisted the firm in preparing its application and lobbied the PVB committee in charge of awarding contracts. These efforts failed, however, when Miller revealed to the PVB committee that Lazar was a director of Miller & Rothman. James Rose, Comptroller of the PVB and chairman of the selection committee, informed Lindenauer that Lazar's existing relationships with both Miller & Rothman and Datacom constituted a conflict of interest. Lindenauer and Lazar responded by having Miller inform the PVB by letter that Lazar would no longer serve as a director of Miller & Rothman. The effect of this letter was blunted, however, when Miller, in response to a direct question from Rose, revealed that Lazar was a partner in Miller & Rothman. Having thus learned of Lazar's ownership interest, Rose sought to defeat Miller & Rothman's application before his committee.

Shafran thereupon intervened. He lobbied each member of Rose's committee in an effort to secure votes for Miller & Rothman. When Rose confronted Shafran with the facts underlying Lazar's confict of interest, Shafran lied, telling Rose that Lazar had no relationship whatsoever with Miller & Rothman. Shafran nevertheless withdrew his support for Miller & Rothman when DOT Commissioner Anthony Ameruso told him that Shafran's close affiliation with Lazar appeared improper, especially in light of Shafran's enthusiasm for Miller & Rothman. Lindenauer, realizing the potential risks inherent in his continued vocal support for Miller & Rothman, informed Rose that he would not object to the committee's rejection of Miller & Rothman's application. Subsequently, Rose's committee rejected the application, much to the relief of Lindenauer, who told Manes that "these guys [presumably Lazar, Shafran and Miller] were so dumb they would have gotten us all in a lot of trouble."

4. *Systematic Recovery Service*

Lazar was involved with yet another PVB contractor, Systematic Recovery Service ("SRS"), a debt-collection agency. The owner and president of SRS, Bernard Sandow, first met Lazar in 1976 shortly after Lazar had left his position as Administrator of the DOT. Claiming that he still controlled the PVB, Lazar promised that he could obtain a PVB first-placement contract for SRS, a promise fulfilled in early 1977. Although Lazar and Sandow agreed that Lazar would receive a commission on SRS's profits, SRS earned no profits. In 1980, Lazar and Sandow entered into another agreement under which Sandow agreed to pay Lazar a monthly retainer in exchange for Lazar's assistance in obtaining PVB work for SRS. Sandow, however, failed to make timely payments and ultimately cancelled the agreement in November 1980. Annoyed at Sandow's failure to meet his obligations, Lazar asked Lindenauer to terminate the PVB's contract with SRS. Lindenauer balked at this suggestion, pointing out that "[y]ou just can't do something like that for no reason." Soon thereafter, Shafran also asked Lindenauer to cancel SRS's contract. Lindenauer again refused. Lindenauer nevertheless instructed James Rose to draft a memo rationalizing a reduction in assignments to SRS..

Lindenauer's attitude toward SRS soon changed. In the middle of 1980, Sandow hired his close friend Sheldon Chevlowe to execute judgments on behalf of SRS. Chevlowe, also a close friend of Manes, subsequently suggested to Lindenauer that Sandow could serve as a source of bribe payments. Indeed, Sandow in late 1980 agreed to pay Chevlowe two and one-half percent of SRS's collection commissions in exchange for Chevlowe's assistance in gaining favor with the PVB. Sandow began making these payments in cash to Chevlowe in early 1981. Chevlowe, in turn, gave the cash to Lindenauer, who divided it evenly between himself and Manes. After he began receiving bribes from Chevlowe, Lindenauer directed Rose to increase SRS's assignments and to give SRS whatever types of summons assignments Sandow might request. SRS's first-placement contract was subsequently renewed. Some months later,

Lindenauer told Chevlowe that he had begun to feel "very comfortable" with Sandow, but complained that collecting money from Sandow through Chevlowe had become logistically "awkward." According to Lindenauer, "it was getting more and more difficult to arrange all these crazy meetings." After gaining Manes's approval, Lindenauer began to receive bribes directly from Sandow in early 1982.

Sandow's payments to Lindenauer increased as SRS, due to Lindenauer's efforts, received more assignments and commissions from the PVB. Indeed, when Lazar stopped paying bribes on behalf of Datacom in mid-1982, Lindenauer blocked the renewal of Datacom's rental-car contract and ensured that the contract was given to SRS. Lindenauer subsequently received two and one-half percent of SRS's commissions under its new contract. By December 1985, Lindenauer and Manes had split $250,000 to $300,000 in cash payments from Sandow. In addition, Lindenauer had received other benefits from Sandow, including meals, video equipment, airline tickets and an encyclopedia.

Shortly after SRS had gained favor with Lindenauer, the firm encountered some resistance from Shafran, who was actively supporting Datacom. In particular, Shafran wanted to renew Datacom's rental-car contract, and he became furious at Lindenauer when the contract was given to SRS. Fearing Shafran's continued opposition to SRS, Lindenauer urged Sandow to find a way to appease Shafran, such as taking Shafran to lunch more frequently. Moreover, in the spring of 1983, Lindenauer complained to Manes that "I couldn't handle the fights that were going on between Lester and myself in regard to Sandow," and stated that he had even given Sandow permission to give Shafran "money from the bribes that [Sandow] was giving Donald [Manes] and myself." Heeding Lindenauer's advice, Sandow began treating Shafran to expensive lunches, often spending more than $70 for two. Aware that his receipt of these meals was improper, Shafran joked with Sandow about City regulations that prohibited a private vendor from spending more than $5 per meal for a City employee. Shafran went to lunch with Sandow approximately six dozen times between 1983 and 1985. Sandow also took Shafran and his wife

to expensive dinners and concerts. Moreover, Shafran sometimes solicited benefits from Sandow. For example, in December 1985 he asked Sandow to purchase theater tickets to two shows for the Shafran family. Sandow spent $830 on the tickets although he himself did not attend the performances. On another occasion, Sandow allowed Shafran to charge dinner to Sandow's account at a Manhattan restaurant. Overall, between 1983 and 1985, Shafran accepted approximately $3500 in meals and entertainment from Sandow. Well-fed and amused, Shafran became less resistant to SRS.

Lindenauer nevertheless believed that meals and theater tickets might not suffice to guarantee Shafran's support for SRS. After consulting with Manes, Lindenauer told Sandow in late 1982 or early 1983 that "it would be a good idea if [Sandow] could try and get Lester [Shafran] to accept some cash." Thus, shortly after Sandow began regularly taking Shafran to lunch, Sandow offered Shafran cash, stating that "I was starting to become very successful and would like to share my success with [you]." At first, Shafran refused Sandow's offer, telling Sandow that "the better way you can share your success is just continue to do a good job." by 1984, however, Shafran began accepting money from Sandow. For example, during the summers of 1984 and 1985, Sandow gave Shafran approximately $3200 to enable Shafran to visit and to entertain his wife, who was working in rural Pennsylvania at a summer camp attended by the Shafrans' daughters. Moreover, in the early fall of 1985, at Shafran's request, Sandow gave Shafran $1200 to pay for the videotaping of Shafran's daughter's bas mitzvah. The videotaping cost only $300, and Shafran pocketed the remaining $900. In additon, Shafran asked Sandow for money in order to pay for the remodeling of Shafran's kitchen. Sandow responded in December 1985 by handing Shafran $3000 under a table in a Manhattan restaurant.

After each payment to Shafran, Sandow would report to Lindenaur. Pleased with Shafran's eagerness to accept cash, Lindenauer told Sandow that Shafran spoke well of Sandow and that Datacom's influence over Shafran had waned. Indeed, in the fall of 1985, Shafran had gone so far as to ask Datacom not to bid against SRS for a rental-car contract to be awarded

in 1986. Late in 1985, however, Shafran announced that he was planning to leave the PVB. Fearing that Shafran's departure might damage SRS's chances of securing renewal of the rental-car contract, Lindenauer told Sandow to bribe Shafran to stay at the PVB. Sandow accordingly offered Shafran $5,000 per month to remain at the PVB for one more year. Shafran declined, however, stating that there was no need for him to stay at the PVB because he could control the awarding of the contract from the outside. Shafran then asked Sandow: "If the contract is renewed, can I still get the money?" Sandow, although annoyed at Shafran's insistence on leaving the PVB, agreed to the request.

The FBI arrested Sandow on December 20, 1985. After government agents informed him that he was under investigation in both New York and Chicago, Sandow agreed to cooperate with the government. In particular, Sandow taped a meeting between himself and Shafran at which the two men discussed reports in the press that Sandow was under investigation in Chicago. At this meeting, held on December 31, 1985, Shafran was nervous about speaking with Sandow. In fact, Shafran mouthed the question "Are you wired?", to which Sandow shook his head in response. At another point in the meeting, Shafran wrote Sandow a note asking the very same question, and Sandow orally responded "No, no." Shafran remained unconvinced. When Sandow cryptically reminded Shafran that Sandow had promised to remodel Shafran's kitchen, Shafran abruptly changed the subject and observed that SRS had achieved its success "on the merits."

Shafran nevertheless expressed concern that evidence might exist documenting his receipt of meals and entertainment from Sandow. Shafran expressed concern about the $830 in theater tickets Sandow had recently given him, and Sandow stated that he could see no problem with the tickets. Concerned about recently signing Sandow's name to a restaurant bill, Shafran also wrote a note asking Sandow if there was any problem with the restaurant chits. At the end of the meeting, Shafran walked Sandow to the elevator. Still afraid of being taped he nervously told Sandow, "You're going to make me crazy about keeping your hands in your pocket there. What have you got?" Sandow

pulled a receipt from his pocket to reassure Shafran. Shafran then apologized for his suspicions. Before Sandow entered the elevator, Shafran told Sandow to "work it out," and urged Sandow to "[k]eep it out of New York," Sandow replied, "You know it. If there's any way I can."

5. *Citisource, Inc.*

Defendant Marvin Kaplan owned and operated a group of computer-service companies along with his older brother Albert, and their partners Marvin Kushnick and Morton Karper. The partners were known informally as "The Four K's" and their companies as the "Kaplan Group." The Kaplan Group firms included Computer Facilities Resource, Inc., Retail Data Processing, Data Conversion Corporation, Technical Maintenance and Services, and Data Consulting and Leasing. The Kaplan Group firms provided data-processing services for municipalities throughout the northeast, including Boston, Washington, D.C., Elizabeth, New Jersey, and New York City. These services usually involved the keypunching of parking and other types of tickets.

In about, 1979, Data Conversion Corporation received a contract to perform the microfilming of parking tickets and the manual entry of information from parking tickets into the PVB computer. In the early 1980's the PVB began to explore the possibility of using hand-held computers to issue parking tickets. At the end of the day, information stored in these hand-held computers would be transferred electronically to the PVB's data-processing system. The need for keypunching would be eliminated. The Four K's understandably feared that Data Conversion's keypunching work for the PVB would be jeopardized if they did not develop the new computer system themselves. Accordingly, in 1981 the Four K's hired Robert Richards, an investment partner of the Kaplan brothers, to oversee the development of a hand-held computer. The Four K's also hired Stanley Friedman as a lobbyist to assist them in obtaining a contract with the PVB for the development of the computer.

After leaving his position as Deputy Mayor, Friedman practiced law and remained politically active. He served as Chairman of the Bronx Democratic Committee and as a member of

the Democratic National Committee. Like Manes, he was thus one of New York City's most influential politicians. As a lobbyist for the Kaplan Group, Friedman used his influence to organize a meeting attended by himself, Kaplan, Richards, Lindenauer and Lawrence Yermack, the Deputy Commissioner of the DOT. At this meeting, Kaplan and Richards attempted to persuade Lindenauer, Yermack and other City officials to award the Kaplan Group a contract to conduct a pilot project to develop the hand-held computer. Although the Kaplan Group sought a "sole-source" contract, Yermack stated that any contract for the computer would be awarded through competitive bidding.

Soon after their meeting with Yermack, Kaplan told Lindenauer that he would handsomely reward Lindenauer and Manes if they would assist the Kaplan Group in obtaining the contract. Specifically, Kaplan offered Lindenauer and Manes $500,000 each in stock of the company that Kaplan was creating to develop the hand-held computer. Lindenauer and Manes agreed to Kaplan's proposal. Manes insisted, however, that Friedman be enlisted to hold the stock. Lindenauer accordingly asked Friedman to hold the stock in three blocks, one each for Manes, Lindenauer and Friedman. Friedman agreed.

Municipal agencies in New York City solicit competitive bids by issuing "requests for proposal" ("RFPs"), which set forth specifications for contracts to be awarded through competitive bidding. Kaplan directed Richards to assist Lindenauer, whom Kaplan described as a friend of the Kaplan Group, in drafting an RFP for the hand-held computer. When they met, Lindenauer told Richards that he wanted to assure that the Kaplan Group would receive the contract for the hand-held computer and asked for information that would enable Lindenauer to draft an RFP favorable to the Kaplan Group.

Richards and Lindenauer then drafted an RFP that required the company obtaining the contract to guarantee the continuation of manual data entry. The Kaplan Group, whose Data Conversion Corporation was already engaged in manual data entry, was ideally suited to render such a guarantee. The RFP also provided that the PVB would make payments that were based on the number of summonses processed by the new sys-

tem. The firm that won the contract would thus not be paid for developing the computer until the new system actually began to operate. Confident in the ability of the Kaplan Group to raise capital, Lindenauer and Richards believed that providing for payments based only on summons volume would favor the Group. In January 1983, the Kaplan Group formed Citisource, Inc. to respond to the RFP. Marvin Kaplan and Robert Richards were named chairman and president, respectively, of the new firm. Although Citisources's response to the RFP acknowledged Friedman's position as "special counsel" to the firm, at Kaplan's direction it omitted Friedman from its list of Citisource's prospective major shareholders.

Ten firms submitted responses to the RFP. Of these firms, Lindenauer's technical staff selected Motorola as the most qualified. Lindenauer nevertheless sought to convince the PVB's selection committee to recommend Citisource over Motorola and the other bidders. Lindenauer delivered to Richards the proposals submitted by Citisource's rivals and asked Richards to prepare comparative evalutations of the proposals. Richards responded by drafting a batch of handwritten evaluations favoring Citisource. After arranging to have the evaluations typed at the PVB, Lindenauer instructed PVB staff members to issue the evaluations to the selection committee and to take credit for their preparation. The PVB employees, threatened with dismissal by Lindenauer, obeyed his orders.

During the selection process, Lindenauer sought assurances from Kaplan, Friedman and Richards that the Kaplan Group would keep its side of the bargain. Kaplan told Lindenauer that the Citisource stock would soon be issued and that Friedman would receive 57,500 shares to hold for Manes and 57,500 shares to hold for Lindenauer. When Lindenauer visited Friedman, Lindenauer emphasized his desire that Friedman receive the stock before the selection committee's vote. Friedman stated that he understood, and wrote "57,500" on a piece of paper. After showing the paper to Lindenauer, Friedman burned it in an ashtray. Lindenauer also told Richards that Friedman would hold 50,000 shares of Citisource stock each for Manes and for Lindenauer. Subsequently, when Lin-

denauer asked Richards if "everything [was] all right," Richards responded that "Donald gets 50 and you get 50."

Citisource issued its stock in April 1983. Friedman subsequently received three certificates for 50,000 shares each and one certificate for 7,500 shares.[1] In late May, Friedman assured Lindenauer that he had received the stock by showing Lindenauer a letter confirming Friedman's receipt of three 50,000-share blocks of stock. Lindenauer subsequently informed Manes that Friedman had received the stock and told Manes that the PVB selection committee would make its decision in a matter of days. Lindenauer also reminded Manes that Manes "had to get it [the proposed Citisource contract] through the Board of Estimate." Manes responded, "I know. You don't have to tell me. All I want to know from you is when it's going to appear before the Board of Estimate and give me the calendar number." When the PVB selection committee met on June 7, 1983, however, the committee expressed concern that Citisource had yet to develop an adequate printing device for its hand-held computer. Lindenauer falsely told the committee that such a printer had been developed and that he had seen it. The committee then voted unanimously to award the contract to Citisource.

In the early months of 1984, the Kaplan Group decided to offer Citisource stock to the public in order to raise capital for the development of the hand-held computer. The company's only asset, however, was the prospect of obtaining a PVB contract, which had yet to be approved by the Board of Estimate. Friedman accordingly exerted his influence to expedite consideration of Citisource's prospective contract. While concealing his ownership of Citisource stock, Friedman lobbied Deputy Mayor Stanley Brezenoff, stating that Citisource was his client and urging that a decision on the PVB contract be made because the delay was causing Friedman "terrible embarrassment" and Citisource "a lot of financial difficulties." The contract was placed on the Board of Estimate's calendar in June 1984 and was approved at the end of that month. Shortly

[1] In a subsequent reissuance of stock, Friedman received an additional 10,000 shares, thus bringing the total in his possession to 167,500 shares, the number he has been ordered to surrender.

thereafter, Citisource signed a City contract valued at approximately $22 million.

Citisource then filed a draft prospectus concerning the public offer of stock with the Securities and Exchange Commission. Although the company had thus far successfully concealed Friedman's ownership interest and directorship from the City, the draft prospectus accurately disclosed that Friedman was both Citisource's largest shareholder and a director of the company. After newspaper reports of the prospectus were published, Michael Zapantis, counsel to the PVB, wrote to Citisource and demanded to know when Friedman had first become a shareholder and a director. Citisource's response, drafted by Friedman and Kaplan and signed by Richards, falsely stated that Friedman had not become a shareholder until September 28, 1983, more than three months after the PVB selection committee's vote and four months after Friedman had in fact received his shares.

Citisource went public in the fall of 1984, and by February 1985 its stock traded at $15 per share. Each 50,000-share block of stock was thus worth $750,000. The company, however, failed to meet production deadlines. In January 1986, after the government's investigation of Citisource became public, the City canceled Citisource's contract. At approximately the same time, Kaplan told Richards to remain silent about Friedman's role in holding stock for Manes and Lindenauer. In February 1986, during testimony before the SEC, Kaplan was asked why Friedman was Citisource's largest shareholder. Kaplan responded by giving a rambling answer ultimately stating that he believed the stock was given to Friedman solely because he would be an asset in introducing, advising and helping Citisource.

6. *The Bernard Joint Venture*

Having fired Michael Lazar, *see supra* Part B(2), Joseph Delario believed in late 1982 that his company, Datacom, needed to hire a new consultant to handle its difficulties with Lindenauer and the PVB. Delario's friend Marvin Kaplan suggested that Datacom retain Stanley Friedman for approx-

imately $150,000 to $200,000. Delario agreed, but felt that he could not pay such a fee openly. He thus proposed that Friedman's retainer be taken from payments made by Kaplan's Data Conversion Corporation for services that Datacom regularly performed for Data Conversion outside New York. Instead of paying Datacom, Data Conversion would make payments to Friedman, and no payments to Friedman would appear in Datacom's records. Kaplan liked the idea, and his firm issued Friedman checks amounting to more than $200,000 during the following two years.

As already noted, however, Datacom did not succeed in obtaining renewal of the rental-car contract that Lindenauer and Manes were determined to deliver to SRS. Friedman explained to Delario that it was "politically impossible" for Datacom to obtain both of the contracts that it sought. Not a good loser, Delario then sought a way to separate Lindenauer from the PVB. Delario thus met with Friedman and Kaplan and complained about both Lindenauer's enmity for Datacom and his propensity for corruption. Friedman and Kaplan initially stated that they did not think Lindenauer was corrupt, and Friedman explained that Lindenauer would be shielded by Manes in any event. Delario later suggested that Manes could help Lindenauer find another job. Apparently hoping to convey to Delario the impossibility of this suggestion, Friedman scrawled "They are partners" on a scrap of paper that he then burned.

Friedman would soon earn his Datacom retainer, however. Delario had long urged the PVB to institute a towing program for vehicles registered in New York, just as the agency had done for out-of-state vehicles. While the sheer number of in-state vehicles had always posed a mammoth obstacle to such a program, the prospect of the PVB's hand-held computer provided a possible solution to this problem. There were nevertheless differing opinions as to who should get the contract. On the one hand, Lindenauer hoped to award the contract jointly to SRS and to Sennet & Krumholtz ("S&K"), another collection agency from which he and Manes regularly took cash. On the other hand, Shafran wanted to see the contract given to Datacom, in the hope Datacom would then give him a job.

Lindenauer and Shafran ultimately resolved this difference of opinion by agreeing that SRS, S&K and Datacom should strike a deal to cooperate in running the in-state towing program.

Bernard Sennet and Samson Jochnowitz, the principals of S&K, and Sandow, of SRS, objected strongly to this proposal. Although Sennet and Jochnowitz expressed a willingness to pay a portion of their expected commissions from the towing program to Lindenauer and Manes, they were unwilling to work with Datacom. Lindenauer discussed this stalemate with Manes and proposed that Friedman, who was then representing Datacom, be enlisted to make peace among S&K, SRS and Datacom. Manes agreed, and soon thereafter Lindenauer went to Friedman's home to discuss the in-state towing program. After explaining how S&K and SRS were blocking the towing program with their objections to Datacom, Lindenauer told Friedman that "I think that you can serve as the peacemaker in this whole thing." In response, Friedman immediately suggested that he receive one-third of the money that was to be diverted from SRS and S&K to Lindenauer and Manes. When Manes later learned of this proposal, he became angry at Lindenauer. As a consequence, Lindenauer met again with Friedman and proposed that Friedman receive a separate commission from Datacom and share it with Lindenauer and Manes. Although he had not been hired by Datacom to work on the in-state towing program, Friedman seized upon Lindenauer's suggestion and announced that he would charge Datacom a commission of one percent on the proceeds it received from the towing program.

After several months of negotiation conducted with Friedman's guidance, the three firms agreed upon a structure for the towing program. SRS and S&K would form a joint venture, the Bernard Joint Venture ("BJV") (named after Bernard Sandow and Bernard Sennet), to administer the towing program. The BJV would retain Datacom as a towing subcontractor for a percentage of the commissions received by the BJV. Delario agreed to pay one percent of the total collections generated by the BJV to Friedman. Friedman insisted, however, that his fee be laundered through Kaplan, and Kaplan agreed to pass Friedman's money through Desu Consulting and Leasing,

a firm in the Kaplan Group. On January 31, 1985, Delario and Kaplan signed a sham agreement under which Datacom agreed to pay Desu one percent of the BJB's commissions, ostensibly for data-processing services but in truth to give to Friedman. Friedman was expected to earn $100,000 to $500,000 during the BJV's first year of operation.

Meanwhile, Lester Shafran saw opportunity in the BJV. While the BJV was being formed—and thus before Shafran approved it as the PVB's director—Shafran initially solicited from Bernard Sennet of S&K a partnership interest in Sennet's firm to be awarded after Shafran left the PVB. Subsequently, Shafran agreed to accept in lieu of the partnership a $100,000 consulting contract from the BJV to begin after Shafran left the PVB. The contract would be conditioned upon the BJV's success and would be paid from its revenues. As Sennet explained to Sandow, "That's going to be the way we're going to take care of Lester." Shafran, in turn, took care of the joint venture and authorized the in-state towing program in February 1985. He nevertheless continued to seek assurances that Sennet would honor their agreement for the future consulting contract. Indeed, at one point, when the BJV's principals refused Shafran's request for a $50,000 advance payment, Shafran obtained Friedman's aid, and Friedman later told Lindenauer that he would ensure that the BJV stood by its $100,000 commitment to Shafran.

7. *The Final Days*

In the middle of 1985, Marvin Kaplan suggested to Joseph Delario that the Kaplan Group and Datacom bid jointly for a new PVB contract for the provision of data-processing and facilities-management services. According to Kaplan's proposal, the joint bid would be submitted in Datacom's name, and a Kaplan Group firm would be retained as a subcontractor. Delario, however, feared opposition from Lindenauer and asked Friedman whether Lindenauer could be controlled. Friedman responded by writing a dollar sign on a piece of paper, which he then showed to Delario and burned in an ashtray. Friedman accordingly negotiated an agreement under

which Lindenauer, Friedman and Manes would divide equally among themselves approximately ten percent of Datacom's earnings under the new contract. Because Lindenauer did not trust Dataco, however, he subsequently insisted on receiving a $50,000 advance. Friedman stated that the most he could arrange was $35,000 but promised to discuss the matter with Delario.

A short time later, on September 23, 1985, Friedman, Delario and Lindenauer met over dinner. At one point, Lindenauer stated that he was "very pleased that we're now working together, and the three of us are partners in this venture." Friedman, who had not yet advised Delario of the details of the payment to Lindenauer, looked surprised and began to chew nervously on his cigar. Friedman later related this incident to Manes. On the next day Manes chastised Lindenauer, stating. "[Y]ou've got a big mouth. . . . Where the hell do you get off opening your mouth like that? Stanley [Friedman] was so disturbed, . . . [h]e wanted to walk away from everything." Lindenauer later apologized to Friedman and promised that "it won't ever happen again."

Immediately after the dinner, Friedman assured Lindenauer that Delario would keep his word. Friedman subsequently met with Delario and Kaplan in late October 1985 and informed them that Lindenauer and Manes wanted ten percent of Datacom's earnings under the new contract. Despite some misgivings, Delario and Kaplan agreed to this arrangement. When Friedman next brought up the issue of the $35,000 advance to Lindenauer, Delario expressed vehement opposition. Kaplan, however, offered to advance the money through a Kaplan Group firm. Delario then relented, and Kaplan and Friedman agreed to disguise the payment by issuing a false legal bill. Soon thereafter, Lindenauer received, through Manes, a $15,000 payment from Friedman on behalf of Delario and Kaplan. Lindenauer often asked Datacom to draft memoranda that could be used to persuade the DOT that Datacom should be awarded the contract. As Robert Richards had done on behalf of Citisource, Datacom personnel drafted the memoranda to appear as Lindenauer's work product. Finally, Delario and Kaplan began to execute a scheme by which Datacom reim-

bursed Kaplan for Lindenauer's advance. This scheme, however, was soon halted by news of an FBI investigation.

Kaplan and Delario met in January 1986 to discuss the implications of the FBI investigation. Delario expressed fear that the advance payments to Lindenauer might come to light and asked whether Friedman had ever actually made the payment. Kaplan responded that Friedman had refused even to talk about the matter. Delario and Kaplan also discussed the agreement through which Desu Consulting and Leasing laundered Delario's payments to Friedman. In particular, Kaplan suggested canceling the agreement and backdating the cancellation to December 2, 1985, a date preceding revelation of the governments' investigation. Delario agreed to this suggestion and promptly prepared a backdated cancellation. Delario also sent Friedman a retainer agreement under which Datacom agreed to pay him $7,000 per month. This agreement gave the false appearance that Friedman was only then beginning to represent Datacom in connection with the in-state towing program. In addition, Kaplan sent Datacom false invoices for the repayment of Datacom's portion of the money Kaplan had advanced to Lindenauer.

Donald Manes responded to the investigation by unsuccessfully attempting suicide in January 1986. Friedman, Delario and Kaplan met shortly after this event and agreed upon a story to explain the cancellation of the Desu agreement. Friedman emphasized to Delario that the latter should, if asked about the joint venture negotiations, falsely tell federal authorities that he had approached Friedman. Manes killed himself in mid-March.

DISCUSSION

A. *Sufficiency of the Evidence and Related Issues*

Putting aside contentions regarding the jury's finding of a RICO conspiracy, *see infra* Part B, only Shafran and Kaplan contest the sufficiency of the evidence on specific counts or predicate acts. Shafran argues that the evidence was insufficient to support the jury's finding that he was guilty of the bribery predicate acts underlying his RICO convictions. He

also asserts that the jury was improperly instructed on the bribery charges against him. In turn, Kaplan argues that there was insufficient evidence to support his perjury conviction or the predicate finding of bribery. These contentions are all without merit.

1. *Shafran: Bribery Racketeering Acts*

Shafran contends that his RICO convictions, which were predicated upon acts of bribery, must be reversed for two reasons. First, he argues that the evidence was insufficient to prove an intent to receive bribes. Second, he argues that the district court committed error by failing to instruct the jury that the benefits he had received from Sandow might be viewed as gifts, rather than as bribes or gratuities.

(a) *Sufficiency.* Under New York law, a public servant is guilty of receiving a bribe "when he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced." N.Y. Penal Law §200.10 (McKinney Supp. 1988). As the language of the statute suggests, acceptance of a bribe "requires no act beyond the agreement or understanding." *People v. Charles,* 61 N.Y.2d 321, 326, 462 N.E.2d 118, 120, 473 N.Y.S.2d 941, 943 (1984). So long as a public servant has "colorable" authority over the subject of the agreement or understanding, or she may be found guilty of receiving a bribe even if the public servant does not or cannot perform the contemplated action. *See id.*; N.Y. Penal Law §200.15 supplementary practice commentary (McKinney Supp. 1988). Moreover, "[i]t is immaterial that the result sought by the bribe giver is a lawful and proper one, or indeed that the outcome sought would have happened in the absence of a bribe." N.Y. Penal Law §200.10 (McKinney 1975) practice commentary; *accord United States v. Brennan,* 629 F. Supp. 283, 294 (E.D.N.Y.), *aff'd.* 798 F.2d 581 (2d Cir. 1986).

Shafran was found guilty of six predicate acts of receiving bribes: five relating to his receipt of various benefits from Bernard Sandow, and one involving the BJV consulting contract.

In contesting the sufficiency of the evidence supporting these verdicts.[2] Shafran emphasizes the lack of evidence of an explicit statement that he was accepting the Sandow benefits and the BJV consulting contract in exchange for the exercise of his official discretion. In Shafran's view, the worst inference a reasonable jury could draw is that the Sandow benefits and the consulting contract were either gratuities or gifts from a rich friend. This contention is frivolous.

As we have stated too often to warrant the citation of authority, a defendant challenging the sufficiency of the evidence on appeal bears a heavy burden. We must view the evidence in the light most favorable to the government, resolving all issues of credibility in its favor and drawing all permissible inferences of guilt.

Moreover, the "agreement or understanding" element of bribery "is indistinguishable from a conspiratorial agreement," and accordingly "may be proven by circumstantial evidence." *United States v. Covino,* 837 F.2d 65, 70 (2d Cir. 1988); *cf. United States v. Young,* 745 F.2d 733, 762 (2d Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985). Indeed, evidence of a corrupt agreement in bribery cases is usually circumstantial, because bribes are seldom accompanied by written contracts, receipts or public declarations of intentions. *Cf. United States v. Manton,* 107 F.2d 834, 839 (2d Cir. 1939) ("often if not generally, direct proof of a criminal conspiracy is not available"), *cert. denied,* 309 U.S. 664 (1940). This is especially true in cases involving governmental officials or political leaders, whose affairs tend more than most to be subjected to public scrutiny. As a result, a jury can in such cases infer guilt from evidence of benefits received and subsequent favorable treatment, as well as from behavior indicating consciousness of guilt.

In the instant case, there is abundant evidence of such conduct and such a state of mind. The evidence shows that Sandow, at the behest of Lindenauer, engaged in a concerted effort to influence Shafran's official judgment by wining and

[2]In view of our disposition of the mail fraud counts, *see infra* Discussion Part G, we need not address Shafran's claim that the evidence is insufficient to support his conviction on the bribery-related mail fraud counts (Counts Eight and Nine).

dining him and ultimately by giving him cash. The evidence also shows that after these efforts began, Shafran's attitude toward Sandow's firm, SRS, quickly turned from opposition to favoritism, even to the point of Shafran's asking Joseph Delario of Datacom to refrain from bidding against SRS. Moreover, although Shafran refused Sandow's offer of a bribe to stay at the PVB, his avowed reason for this refusal was his belief that he could control the PVB on behalf of Sandow just as easily from the outside. Indeed, while stating his firm intention to leave the PVB and declining the bribe for that proffered reason, Shafran nevertheless asked if he could still get the money if the rental-car contract was renewed. Finally, Shafran's acceptance of cash literally underneath a table and his later suspicion that he was being taped hardly reflect an innocent state of mind.

Shafran fares no better with respect to the BJV consulting contract. Before granting his approval for the in-state towing program, Shafran asked Bernard Sennet for a partnership in Sennet & Krumholtz. In lieu of this partnership, however, Shafran agreed to accept the consulting contract. Shafran subsequently gave the in-state towing program his final approval in February 1985. Sennet, Sandow and Lindenauer all understood that the consulting contract was necessary to ensure Shafran's cooperation. Sennet observed, for example, that the contract was the means by which the BJV would "take care of Lester," and Shafran told Sandow in 1985 that "[t]he towing joint venture is my idea, and you owe me." Finally, Lindenauer, alluding to his previous difficulties with Shafran concerning SRS, warned Sandow:

> You've got to make sure that Lester is comfortable and taken care of in terms of this thing or else the program is not going to fly and I'm tell[ing] you right now, Bernie, I'm not going to get into another one of these battles with Lester. It just isn't going to work, as far as Lester is concerned. It's his program; he orchestrated the whole program, and I'm not looking for this kind of grief.

From the timing of Shafran's solicitation and from his openly proprietary interest in the towing program, the jury could hardly have reached any conclusion other than that Shafran knowingly used the implied threat of delay or disapproval of the BJV contract in order to extract the consulting-contract bribe from Sennet.

(b) *Proposed "Gift" Instruction.* Shafran also contends that his RICO convictions should be reversed because the district court failed to instruct the jury that it could find the Sandow benefits to be gifts, rather than bribes or gratuities. Specifically, he objects to the district court's refusal to give his proposed instruction that "a public servant may receive something from a friend or associate which is not a gratuity focused on his public office at all. If that is so, then there is no violation of any kind, be it a City rule or anything else."

We first address the question whether, under Fed. R. Crim. P. 30, the objection was properly preserved for appellate review. In addition, because Lazar's challenge to the multiple-conspiracies charge (*see infra* Part B(1)(b)) raises a similar question under Rule 30, we address Lazar's waiver arguments here as well.

The government asserts that Shafran and Lazar did not make specific objections to the district court's instructions on bribery and multiple conspiracies, respectively. Both Shafran and Lazar concede as much, but contend nevertheless that their requests to charge preserved these claims. This contention, however, defies the plain language of Rule 30, which at the time of the trial stated in pertinent part:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests . . . The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict,*

> *stating distinctly the matter to which he objects and the grounds of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Fed. R. Crim. P. 30 (emphasis added). The separate references in Rule 30 to charge requests and to objections clearly indicate that a charge request does not relieve a party of the obligation to make a specific objection. *See United States v. McCaskill,* 676 F.2d 995, 997 n.3 (4th Cir.), *cert. denied,* 459 U.S. 1018 (1982); *cf. United States v. Barash,* 412 F.2d 26, 33 (2d Cir.) (failure to object to trial court's omission of agreed-upon compromise instruction did not preserve claim), *cert. denied,* 396 U.S. 832 (1969). Moreover, a requested charge is not a "distinct" objection to a charge adopted by the district court. Even when the language selected by the district court is substantially different from language proposed by the defendant, the differences may or may not be material. Rule 30 thus serves the important purpose of relieving the district court of the significant burden of having to guess which differences in language are considered material by the parties. Avoiding such guesswork is particularly important in a case involving four defendants and potentially five sets of proposed charges. Rule 30 also "give[s] the trial court an adequate opportunity to correct any mistakes in the jury charge." *United States v. Hamilton,* 684 F.2d 380, 385 (6th Cir.), *cert. denied,* 459 U.S. 976 (1982).

Lazar nevertheless asserts that his failure to object is excused because the district court stated during charge conferences that it wished only to hear "comments," and because the court, immediately after delivering the charge, instructed counsel not to repeat points already expressed on the record. Shafran similarly points out that "[r]epeatedly during the trial, the district court stressed that once counsel made a request or an argument, counsel need not reassert it to preserve appellate rights."

Counsel had ample opportunity during Judge Knapp's lengthy charge conferences, however, to make specific objections to language contained in, or omitted from, the proposed instructions. At these conferences, Judge Knapp patiently read aloud each line of his proposed instructions and permitted

counsel to interject with comments, criticisms and proposed alternative language. For instance, immediately after Judge Knapp had recited the proposed RICO conspiracy charge during a session held on November 19, 1986, counsel for the government asked the court "to charge the jury that people could participate in the conspiracy at different times, and you don't have to be in the conspiracy during the entire length of it." None of the defendants, however, made any objection or "comment" regarding the multiple-conspiracies language. The next day, when the bribery instruction was reviewed, counsel for Shafran made no mention of "gifts" but instead engaged in a lengthy discussion, set forth in the margin,[3] about the instruc-

[3]The discussion reads as follows:

> Mr. Schwartz: [for the government]: Your Honor, the next thing is on page 44, concerning Mr. Shafran. At the bottom of the page, where you say "Shafran contends that the opportunity was a gratuity. ["] I don't think Mr. Silverman argued that, and I don't think that should be in the charge. He argued that—he argued that it wasn't a bribe. [H]e didn't argue it was a gratuity—
>
> Mr. Silverman: [for defendant Shafran]: Say no more, Mr. Schwartz. That is exactly my position, your Honor, I would ask that your Honor remove at the top of page 45 after the word—
>
> Mr. Schwartz: I'm going to ask Mr. Silverman, if he's going to argue anything from Mr. Sandow as a gratuity.
>
> Mr. Silverman: I thing I already—
>
> The Court: Wait a minute. *You want to say Shafran contends the opportunity to invest in the Candler Building had nothing to do with the affairs of the PVB?*
>
> Mr. Silverman: Period. I'm not arguing that it was a gratuity.
>
> The Court: You want it to say Shafran contends the opportunity to invest in the Candler Building had nothing to do with affairs of PVB.
>
> Mr. Silverman: Period.
>
> The Court: This contention, tried to—
>
> Mr. Silverman: Yes, sir, I'm not arguing it was a gratuity.
>
> Mr. Schwartz: *Similarly, your Honor, as long as we're on the subject, I would ask Mr. Silverman if he's going to*

(Footnote continued on following page)

tor's references to his other contentions regarding the Candler Building and the Sandow benefits. In addition, after the charge was given to the jury, counsel for Shafran objected to the particular phrasing of the instruction without addressing its failure to mention "gifts."[4]

(Footnote continued.)

argue that the thing that we contend Mr. Shafran received from Mr. Sandow was gratuities. If he's not going to argue that, we think the gratuity language should be stricken.

Mr. Silverman: *I think I have argued and I intend to argue if the jury does believe that Mr. Shafran did receive any of the economic benefits that Mr. Sandow did testify to, they could conclude that it was gratuity.*

Mr. Schwartz: If he's going to argue that, we have no objection.

Page 46, your Honor.

[4]Specifically, counsel objected to the portion of the charge that stated that "Shafran argues that . . . the Government has not succeeded in proving beyond a reasonable doubt that Shafran considered [the Sandow benefits] as anything but mere gratuities. [If] [t]his contention raised a reasonable doubt in your mind, you must find racketeering acts 8 through 15 not proven against Shafran." The objection, and the ensuing colloquy, reads as follows:

> Mr. Silverman: The other item I want to bring to the Court's attention, at page 50, referring to the gratuities. *I think the language should be that if they find that they were gratuities, not bribes,* then they must find the defendant not guilty.
>
> The Court: I said, if it raises a reasonable doubt in your mind, you must find them not guilty.
>
> Mr. Silverman: The way I read it, it doesn't come out that way. I read it four or five times, and if the Court can look at it tonight and see whether or not it comports with my interpretation. It seems to say that we argue that the payments have been made and the—if the Government has not succeeded beyond a reasonable doubt, Shafran—*if the jury finds that Mr. Sandow intended them as mere gratuities,* in that case they must find that there was no bribe—
>
> The Court: What they have to find is what Mr. Shafran intended, not what Mr. Sandow intended.
>
> Mr. Silverman: According to the Government's proof, *if the jury believes that Mr. Sandow intended them as mere*

(Footnote continued on following page)

Sharfran and Lazar thus had ample opportunity to object to the jury instructions in question, and we see no reason to excuse their failure to comply with Rule 30. *See Barash*, 412 F.2d at 33; 2 C. Wright, *Federal Practice and Procedure* §484 (1982). ("A party who has requested an instruction that has not been given is not relieved of the requirement that he state distinctly his objection to the instruction that is given."). Accordingly, their objections to Judge Knapp's charge are waived unless the charge constitutes "plain error." Fed. R. Crim. p. 52(b).

We find no plain error in the district court's failure to include any reference to "gifts" in its bribery instruction. The charge clearly and correctly set forth the elements of bribery. In addition, the jury received the following instructions:

> Some of the defendants have argued that certain of the benefits alleged to have been conferred or received were not bribes but gratuities. A gratuity rewards an official for conduct already performed, and does not involve the intent by either the giver or receiver that future exercises of official discretion will be influenced. If you find that a particular instance of alleged bribery involved the payment or receipt of a gratuity, i.e. a reward for past services, and not a bribe, you must find such act of alleged bribery not proven.
>
> • • •
>
> With respect to these acts [the Sandow benefits], Shafran argues that even if you should find these payments to have been made, the Government has not succeeded in proving beyond a reasonable doubt that Shafran considered them as anything but mere gratuities. [If] [t]his contention raised a reasonable

---

(Footnote continued.)

> *gratuities*, then factually they couldn't find that Mr. Shafran thought of them as briberies.
>
> Mr. Schwartz: That's not so.
>
> • • •
>
> The Court: I think I'll let it stand. (emphasis added).

> doubt in your mind, you must find racketeering acts 8 through 15 not proven against Shafran.
>
> * * *
>
> Aside from his general contention that the Government has failed to prove this act beyond a reasonable doubt, Shafran argues that the consulting contract constitutes at most a gratuity rewarding him for his past services, with no expectation of its affecting his exercise of official discretion in the future. If this contention raises a reasonable doubt in your mind, you must find alleged racketeering act 16 not proven.
>
> If you find, obviously, if you find that the alleged contract was simply hiring him to do a job, and it had nothing to do with [the] Parking Violations Bureau, then also that would defeat the Government's claim.

"[R]ead as a whole," *United States v. Colon*, 835 F.2d 27, 32 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 1279 (1988), the district court's charge properly conveyed to the jury "the substance of [the] defendant's request . . . [in the court's] own language." *United States v. Borello*, 766 F.2d 46, 55 (2d Cir. 1985) (quoting *United States v. Taylor*, 562 F.2d 1345, 1364 (2d Cir.), *cert. denied*, 432 U.S. 909, 434 U.S. 853 (1977)).

In any event, we do not believe that the charge precluded the jury from finding that the Sandow benefits were gifts. Having been instructed on the elements of bribery, and having been told that gratuities are not bribes and that the BJV consulting contract would not be a bribe if it were unrelated to Shafran's future official duties, no jury could reasonably have concluded that a true gift could be a bribe.

2. *Kaplan: Bribery of Manes*

Kaplan's RICO convictions are predicated upon the jury's conclusion that he had committed two racketeering acts—the bribery of Lindenauer and the bribery of Manes—during his efforts to obtain on behalf of Citisource the PVB contract for the development of the hand-held computer. Kaplan contends, however, that his RICO convictions must be reversed because

the evidence was insufficient to prove that he had intended to bribe Manes.

Lindenauer testified that he and Kaplan met at Kaplan's office in the spring of 1982, only a few days after the Deputy Commissioner of the DOT refused to grant a sole-source contract for the hand-held computer. According to Lindenauer, at this meeting

> Marvin [Kaplan] said to me that if his company were to win . . . the hand-held issuing contract itself, that he would give stock to me and Donny [Manes] that—we would get approximately a minimum of $500,000 a man for this.
>
> Q. And when Mr. Kaplan said that to you, what did you say to Mr. Kaplan?
>
> A. I said I would get back to him.

Lindenauer testified that he immediately reported Kaplan's offers to Manes. According to Lindenauer, Manes "said to me that this was serious money and that the real problem [would be deciding] who would be holding the stock for us." Manes nevertheless observed that "[t]his is the kind of problem I like." Within the next two days, Manes told Lindenauer that Friedman should hold the stock for them. According to Lindenauer, Lindenauer then reported back to Kaplan:

> Q. What did you say to Mr. Kaplan and what did he say to you?
>
> A. I told Marvin that we would go ahead with the project itself. I would do everything I could to make sure that he won the contract, and that Stanley would get all the stock for the three of us.
>
> Q. What did Mr. Kaplan say to you?
>
> A. He said, "Fine."

Over the next few months, Lindenauer met a number of times with Kaplan and with Robert Richards, president of Citisource, to devise a method of guaranteeing that the RFP for the hand-held computer would be favorable to Citisource. *See generally*

supra Background Part B(5). In April 1983, Lindenauer met with Kaplan in Kaplan's office and said,

> "Marvin, when am I going to be getting the stocks, and what is the amount?"
>
> And Marvin said to me that there would be 57,500 shares given for me, 57,000 for Donald—500 for Donald, 57,500 for Stanley.
>
> I said, "What are we—when are we going to get these stocks?"
>
> Marvin said, "Within the next few days. I'll have the stocks drawn up. We just have to go through standard legal procedures in terms of how stocks are drawn up, and then I'll get the shares to Stanley."

By early May, however, the stock had not yet been delivered, even though the PVB selection committee was soon to make its choice. Lindenauer testified to the following conversation with Richards:

> Q. What did you say to Mr. Richards and what did he say to you?
>
> A. Bob said to me, "Make sure you get the stock before the selection committee meets, because" he said, "you've got to understand something. The Kaplan[s] are pigs and they may play all kinds of games with you. Make sure you get the stock."
>
> Q. What did you say to Mr. Richards?
>
> A. I said okay, I would.
>
> Q. Did you say anything else to Mr. Richards?
>
> A. Yes. I said, you know, "I hear what you're saying, but to me, they would be foolish to play any kind of silly games, because if they played any kind of games, it wouldn't get past. And even if we passed it at the selection committee, if they were still playing games, it had to go through the Board of Estimate, and Donald, Stanley—and Stanley would stop it." So I said, "I'll do it, but it seems to me just dumb that they would try to pull something like that."

Approximately one year later, the contract was approved by the Board of Estimate, of which Manes was a member.

Kaplan launches two attacks upon the evidence detailed above. First, Kaplan challenges Lindenauer's credibility by pointing to the alleged "evolution" of Lindenauer's testimony between his appearances before state and federal grand juries and his testimony at trial. Such a challenge to the credibility of a witness, however, must be made in cross-examination and in subsequent argument to the jury, not in an appellate brief. It is not a function of an appellate court to "second-guess a jury's finding on credibility," *United States v. Stratton,* 779 F.2d 820, 828 (2d Cir. 1985), *cert. denied,* 476 U.S. 1162, 477 U.S. 906 (1986), and we will not do so here.

Second, Kaplan contends that the evidence of his bribe to Manes is insufficient because there is no *direct* evidence that he had given Citisource stock to Manes with the intention of influencing Mane's exercise of official discretion. Kaplan's view of the evidence is that Manes was Lindenauer's "rabbi," or political patron, and that giving Citisource stock to Manes was simply part of the bribe to Lindenauer intended to bring about PVB approval of the Citisource contract. Kaplan is driven to this strained argument, of course, by the need to reduce the predicate acts from two to one in order to upset his RICO conviction.

There is, however, abundant evidence of Kaplan's intent to bribe Manes. Manes, one of the most powerful politicians in the City, was a member of the Board of Estimate, a body whose approval was needed to execute the Citisource contract. Given the need for Board of Estimate approval, the evidence that Manes knew the role he was to play in securing that approval, and Manes's request for information as to when the contract would come before the Board of Estimate, the jury clearly could conclude that the stock was a bribe intended to influence Manes's official conduct.

3. *Kaplan: Perjury*

Kaplan also contends that his perjury conviction must be reversed on the ground that his sworn testimony before the SEC

was literally true. In that testimony, he was asked why the initial issue of Citisource stock was allocated as it had been, and in particular, why Friedman was the largest shareholder. The relevant portion of Kaplan's testimony—with the allegedly perjurious portion placed in emphasis—reads as follows:

> Q. The initial shares, were they allocated in any specific sense of the word for different directors or officers?
>
> A. Yes.
>
> Q. Who made the allocations?
>
> A. Al Kaplan.
>
> Q. Did he do that by himself?
>
> A. Yes.
>
> Q. And what basis did he use to make the allocation?
>
> A. Same basis that we would have used in every venture we ever went into, my brother and myself. He makes it up, and he says, "Here, it is; implement it. That is all I'm willing to sell to anyone person."
>
> And he has reasons why he feels that this one should get this and that one should get that, et cetera.
>
> Q. Is there any reason that you know of why Stanley Friedman received the largest block of shares of the company?
>
> A. I don't know about the largest block, because—I would like that question more clarified, because the four of us, KKKK, owned all the shares. And the four of us, as a block, owned more shares than anyone else.
>
> Q. Okay. Who was the largest individual shareholder of Citisource?
>
> A. I have to look at the prospectus.
>
> Q. Go ahead. It indicates—
>
> (Pause).
>
> A. As of this date—and I want to preface it by saying of the inside shares—it appears that Mr. Friedman is the single largest stockholder. This doesn't preclude

any outside person unbeknown to myself owning a block of more shares.

Q. The inside stock that we are talking about right now, is that the stock that was allocated by Albert Kaplan?

A. Yes.

Q. My question again is, on what basis was allocation made?

A. *You would have to ask Al Kaplan. Al Kaplan is my brother, and I never argue with him in that respect. He has his reasons why. He feels that so and so, he should give this to; maybe a moral obligation. I know Stanley has been a friend of ours for a long time, and he has done a lot of things for us for no remuneration. And he has given us a lot of thought and ideas and spent a lot of time with us.*

I know for a fact that when I spoke to Stanley of my idea, that he did ask and say, "If you ever do anything with this company, I would like to partake in it."

And on that basis, my brother felt that he is—and Stanley is an individual who at the time was affiliated, if I am correct, with Sachs-Bachman [sic], *which is the firm that Ray* [sic], *Cohen* [sic], *is with, and it is a very prestigious law firm.*

And I felt on that basis he would be an asset to us on a national basis—to introduce us, to advise us, to help us in every way possible. And that is the reason why, to the best of my knowledge.

The questioning then turned to other topics.

The federal perjury statute, 18 U.S.C. §1621 (1982), provides that a witness is guilty of perjury if, while under oath, he or she "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true." This language must be construed strictly. In *Bronston v. United States*, 409 U.S. 352, 357-58 (1973), the Supreme Court held that Section 1621 "does not make it a criminal act for a witness to willfully state any material matter that *implies* any material matter that he does not believe to be true," even when the testimony is

designed to, and does, mislead. Thus, Section 1621 does not proscribe "answers unresponsive on their face but untrue only by 'negative implication.' " *Id.* at 361. Combating mere unresponsiveness must be left as a challenge to the "questioner's acuity." *Id.* at 362 (quoting *United States v. Bronston,* 453 F.2d 555, 563 (2d Cir. 1971) (Lumbard, J., dissenting), *rev'd,* 409 U.S. 352 (1973)). Nevertheless, the issue of literal truth is to be resolved by a properly instructed jury. *United States v. Lighte,* 782 F.2d 367, 374 (2d Cir. 1986).

Relying on *Bronston,* Kaplan argues that his SEC testimony, while perhaps unresponsive and incomplete, was literally true. Specifically, he contends that he merely engaged in "speculation about the possible reasons his brother allocated the stock," and that these reasons were not "false" because relatives, friends and employees of the Kaplans were in fact allowed to purchase Citisource stock at a discount. Accordingly, Kaplan submits that the evidence was insufficient to support the jury's finding that his testimony was false. We disagree.

Kaplan's testimony on its face refutes his contention that his ultimate response to the questions about the allocation of Citisource stock was framed in speculative terms. Kaplan's efforts to avoid giving a direct answer were worn down by the persistence of his examiner, and despite his evasive remark that "[y]ou would have to ask Al Kaplan," he nevertheless concluded: "*And I felt on that basis* he [Stanley Friedman] would be an asset to us on a national basis—to introduce us, to advise us, to help us in every way possible. *And that is the reason why, to the best of my knowledge.*" Kaplan thus stated that he believed that Friedman received his Citisource stock because Friedman's prominence and influence would be an "asset" to the firm.

There was abundant evidence from which the jury could have concluded that this answer was intentionally false. For example, Robert Richards testified that, when he asked Kaplan about Lindenauer's concern about Friedman's stock, "Kaplan erupted. . . . [He] began . . . screaming . . . , "It's none of your God damn business what I do. I run the company. I'll make any decision I want to about stock." Richards also testified that, several days after this outburst, Kaplan explicitly admit-

ted that Friedman had been given stock for the purpose of providing shares for Manes and Lindenauer. In addition, both Richards and Lindenauer testified extensively about other discussions with Kaplan about the bribery scheme involving the Citisource stock. Although it may well be true, as Kaplan argues, that his brother performed the actual allocation of the Citisource stock, there can be little doubt that Kaplan knew that Friedman had become Citisource's largest stockholder in order to bribe Lindenauer and Manes. *See also supra* Discussion Part A(2). Kaplan's perjury conviction is therefore amply supported by the evidence.

B. *Misjoinder and Severance*

Three defendants, Lazar, Shafran and Friedman, argue that they were prejudiced as the result of having been tried with their co-defendants. In this section, we address the claims of Lazar and Shafran, both of whom contend that they should have been severed essentially because they were not properly alleged or proven to be members of the RICO conspiracy charged in Count Two.

1. *Lazar*

(a) *Misjoinder.* Under Fed. R. Crim. P. 8(b), "[t]wo or more defendants may be charged in the same indictment . . . if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Although Rule 8(b) limits a prosecutor's power to charge multiple defendants in a single proceeding, that power is probably at its greatest when RICO conspiracy charges are brought. As Judge Sofaer has observed:

> The mere allegation of a conspiracy presumptively satisfies Rule 8(b), since the allegation implies that the defendants named have engaged in the same series of acts or transactions constituting an offense. The presence of a substantive RICO count under 18 U.S.C. §1962(c), and of a RICO conspiracy count under 18 U.S.C.

> §1962(d), further broadens the government's power to charge multiple defendants together. A RICO charge under §1962(c) necessarily incorporates allegations that each of the defendants named was associated with or employed by the same enterprise, and participated in the enterprise by engaging in at least two acts of racketeering related to the enterprise. In short, by loosening the statutory requirements for what constitutes joint criminal activity, Congress limited the force of Rule 8(b) in such situations.

United States v. Castellano, 610 F. Supp. 1359, 1396 (S.D.N.Y. 1985). We have similarly noted that "a construction of Rule 8(b) that required a closer relationship between transactions than that necessary to establish a 'pattern of racketeering activity' under RICO might possibly prohibit joinder in circumstances where Congress clearly envisioned a single trial." *United States v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *accord United States v. Teitler*, 802 F.2d 606, 616 (2d Cir. 1986). In evaluating the defendants' claims of misjoinder under Rule 8(b), then, our task is limited simply to determining whether the indictment properly alleged their participation in a RICO conspiracy.

Lazer claims that he was misjoined because the indictment failed to allege facts sufficient to establish his membership in the single RICO conspiracy charged in the indictment. Specifically, he contends that "nothing in the indictment connects" him with either Friedman or Kaplan and that allegations of his bribery on behalf of Datacom and Miller & Rothman did not suffice to support an inference of conspiratorial agreement among Lazar and his codefendants. As explained in more detail in Part B(1)(b) immediately *infra*, a RICO conspiracy is by definition broader than an ordinary conspiracy to commit a discrete crime. Each member of a RICO conspiracy need only conspire to participate in the affairs of the alleged enterprise through two predicate crimes. Unrelated crimes by others participating in the affairs of the enterprise are thus part of the RICO conspiracy. Accordingly, the indictment properly alleged Lazar's membership in an overall conspiracy to operate the PVB as a racketeering enterprise.

(b) *Proof of a Single Conspiracy.* In an extension of his misjoinder argument Lazar asserts that his RICO conviction should be reversed because the evidence at trial demonstrated the existence of multiple conspiracies instead of the single RICO conspiracy charged in the indictment. He argues that the government presented no evidence of any conspiratorial agreement between Lazer and the defendants added in the fourth superseding indictment, Friedman and Kaplan. According to Lazar, the government proved "some eight conspiracies, with Lazar and the PVB on the one hand and the added defendants and the PVB in a variety of schemes on the other." Lazar asserts that the government's evidence of multiple conspiracies created a material variance. These contentions are also without merit.

Whether the evidence in a case establishes single or multiple conspiracies is a question of fact to be resolved by a properly instructed jury. *E.g., United States v. Nersesian,* 824 F.2d 1294, 1302 (2d Cir.), *cert. denied,* 108 S. Ct. 355, 357 (1987), 108 S. Ct. 1018 (1988). Although Judge Knapp gave the jury an instruction on multiple conspiracies, Lazar contends that the instruction was inadequate and failed "even to submit [the issue] intelligibly" to the jury. Because Lazar waived this claim by failing to object in the district court, *see supra* Discussion Part A(1)(b), we review the multiple-conspiracies charge for plain error.

The charge, which is set out in the margin,[5] correctly stated that the jury could not convict unless it found that the defend-

[5]Then there is another important rule of which you should be aware. In order to convict any defendant of a conspiracy the Government must prove beyond a reasonable doubt that he was guilty of the particular conspiracy alleged in the indictment. It would be wholly immaterial that the Government might prove that the defendant was involved in other or different conspiracies. As I have indicated, the particular conspiracy alleged in this indictment is the alleged agreement among Manes, Lindenauer and others to convert the New York City Parking Violations Bureau into a vehicle for their own enrichment through unlawful activities. Unless the Government has proven a defendant's knowing and willful participation in that particular conspiracy he must be acquitted of this count, whether or not he may have been guilty of other unlawful or conspiratorial conduct.

ant was a member of the conspiracy described in the indictment. *See, e.g., United States v. DiTomasso,* 817 F.2d 201, 211 & n.11 (2d Cir. 1987). The apparent objection to the charge is that it lacked language specifically referring to the possibility that the jury might find conspiracies other than, or in addition to, the one alleged in the indictment. Whether or not inclusion of such language is preferable, its omission hardly amounts to plain error going "to the very essence of the case." *United States v. Calfon,* 607 F.2d 29, 31 (2d Cir. 1979) (per curiam)) (quoting *United States v. Fontenot,* 483 F.2d 315, 322 (5th Cir. 1973)), *cert. denied,* 444 U.S. 1085 (1980). Judge Knapp's instruction plainly stated that Lazar could be convicted only of the conspiracy charged in the indictment and that he had to be acquitted if he was guilty of membershsip in a conspiracy other than the one charged. A jury following that instruction could not have convicted Lazar of some other conspiracy.

The only remaining question is whether the evidence was sufficient to support the jury's conclusion that the government had proven Lazar's membership in the single RICO conspiracy charged in the indictment. Proof of a single conspiracy requires evidence that the alleged co-conspirators "agreed on a 'common purpose' that sufficed to render their activities 'a single enterprise.' " *United States v. Heineman,* 801 F.2d 86, 92 (2d Cir. 1986) (quoting *Kotteakos v. United States,* 328 U.S. 750, 769 (1946)), *cert. denied,* 107 S. Ct. 1308 (1987). At the same time, however, "a single conspiracy is not transposed into a multiple one simply by lapse of time, change in membership, or a shifting emphasis on its locale of operations." *Id.* (quoting *United States v. Cambindo Valencia,* 609 F.2d 603, 625 (2d Cir. 1979), *cert. denied,* 446 U.S. 940 (1980)). Moreover, there is no requirement that each member of a conspiracy conspire directly with every other member of the conspiracy. This is especially true with respect to a RICO conspiracy. As the Fifth Circuit has explained:

> The gravamen of a RICO conspiracy charge "is that each [defendant] agreed to participate, directly and indirectly, in the affairs of the enterprise by commiting two or more predicate crimes." *Under RICO it is irrele-*

vant whether "each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs."

United States v. Stratton, 649 F.2d 1066, 1074 (5th Cir. Unit A July 1981) (citation omitted) (emphasis added) (quoting *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978)). A RICO conspiracy is thus by definition broader than an ordinary conspiracy to commit a discrete crime such as bribery. So long as the alleged RICO co-conspirators have agreed to participate in the affairs of the same enterprise, the mere fact that they do not conspire directly with each other "does not convert the single agreement to conduct the affairs of an enterprise through a pattern of racketeering activity into multiple conspiracies." *United States v. Persico*, 621 F. Supp. 842, 856 (S.D.N.Y. 1985)).

We have no difficulty in concluding that the evidence supported the jury's finding of a single RICO conspiracy. Here, the RICO enterprise was the PVB, a municipal agency rife with corruption. Faced with abundant evidence that Lazar had paid bribes on behalf of two firms—Datacom and Miller & Rothman the jury could easily have found that he knew that bribery was an important, if not essential, tool in ensuring success in obtaining contracts from the PVB. The jury could then have concluded that Lazar knew that he was not simply participating in isolated bribery conspiracies but rather in the broader conspiracy charged in the indictment, a conspiracy to operate the PVB for private gain through a pattern of racketeering activity.

Lazar's multiple conspiracy claim rests heavily on his lack of direct contact with either Kaplan or Friedman, and on the evidence that he and Friedman were "if anything[,] . . . competitors of sorts." This observation, however, misses the point. As already noted, each member of a conspiracy need not directly conspire with every other member. If anything indeed, the arguably competitive relationship between Lazar and Friedman actually supports the jury's finding that each had participated in the affairs of the PVB. Specifically, the fact that Delario, at

Kaplan's suggestion, decided to employ Friedman in Lazar's former role as Datacom's bribe conduit supports the view that Friedman had succeeded Lazar in fulfilling a single role in an ongoing conspiracy to operate the PVB for private gain. Finally, Delario's expressed hope that Lindenauer would be "more comfortable" with Friedman than he had been with Lazar suggests that Delario and others shared the view that Friedman and Kaplan had successively filled a single job in a continuing enterprise. Accordingly, we find no merit in Lazar's multiple-conspiracies claim.

(c) *Prejudicial Spillover.* Lazar nevertheless asserts that he was prejudiced by the admission of a great deal of evidence that he contends would have been inadmissible against him in a "properly severed" trial. Although he makes no reference to Fed. R. Crim. P. 14, we construe this argument as a claim that Judge Knapp erred in refusing to sever his trial under Rule 14. We conclude, however, that the claim so construed has no merit.

A defendant raising a claim of prejudicial spillover bears an extremely heavy burden. Indeed, a motion to sever under Rule 14 is committed to the discretion of the trial court and is "virtually unreviewable." *United States v. Stirling*, 571 F.2d 708, 733 (2d Cir.) (quoting 8 J. Moore, *Moore's Federal Practice* ¶ 14.02[1], at 14-3 (2d ed. 1977)), *cert. denied*, 439 U.S. 824 (1978). To show an abuse of this discretion, it will not suffice simply to establish that a defendant would have had a better chance of obtaining an acquittal at a separate trial. *E.g., id.; United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). Rather, the defendant must show that he or she suffered prejudice so substantial as to amount to a "miscarriage of justice." *United States v. Bari*, 750 F.2d 1169, 1177 (2d Cir. 1984), *cert. denied*, 472 U.S. 1019 (1985).

Lazar has clearly failed to make a colorable showing that he has suffered such substantial prejudice. As already noted, the evidence was sufficient to establish that each of the defendants had participated in a single RICO conspiracy. Lazar was thus a "fully implicated conspirator, and most of the evidence of which he complains would have been admissible against him in

a separate trial as acts of co-conspirators in the furtherance of a conspiracy." *Id.* at 1178; *see also United States v. Nersesian*, 824 F.2d at 1304 (in trial lasting five months, government entitled to present "the entire range of evidence of the conspiracy" against each of sixteen defendants). Lazar's contrary contention, that much of the evidence at trial would have been inadmissible in a "properly severed" trial, is based on the already-rejected premise that he and his co-defendants were not co-conspirators. In any event, Lazar's acquittal of the racketeering act involving his alleged bribery of Shafran demonstrates that the jury individualized its consideration of the evidence against each defendant.

2. *Shafran*

(a) *Misjoinder.* Shafran's claim of misjoinder under Rule 8(b) rests heavily on the fact that he was acquitted of a bribery racketeering act relating to his investment in the Candler Building, a commercial property in midtown Manhattan. The government sought to prove that Shafran's interest in the building was the product of a bribe offered by Lazar on behalf of Datacom. The jury, however, apparently believed Shafran's contention that he had paid fair market value for his investment. Pointing to the government's pretrial emphasis on Datacom as providing the link among the defendants, Shafran now asserts that the Candler Building allegations were the "sole basis" offered by the government for linking him with his co-defendants and that the government joined him without a "reasonable expectation" that these allegations would be proven at trial. *See United States v. Ong*, 541 F.2d 331, 337 (2d Cir. 1976), *cert. denied*, 429 U.S. 1075, 430 U.S. 934 (1977). Accordingly, Shafran contends that the government joined him in bad faith and that his conviction should be reversed. This argument is frivolous.

The Candler Building allegations were not the sole basis for Shafran's joinder. The indictment charged him with having accepted eight bribes from SRS through Sandow and with having accepted a bribe in the form of a consulting contract from the BJV through Sennet and Jochnowitz. These accusations alone

were sufficient to support the indictment's overall allegation that Shafran had participated in a conspiracy to operate the PVB as a racketeering enterprise and provided a sufficient basis for joinder. Shafran's claim of misjoinder must therefore be rejected.

(b) *Prejudicial Spillover.* Shafran nevertheless asserts that because the government did not prove that he had accepted a bribe from Datacom, he could not have been part of the RICO conspiracy and was therefore improperly joined. In particular, Shafran characterizes the BJV consulting-contract bribe as being too "peripheral" to tie him to the RICO conspiracy, because the BJV episode did not involve Lazar, and because Shafran's only contact with Friedman concerning the BJV consulting contract consisted of a single conversation. Additionally, Shafran emphasizes the fact that Lindenauer, Sandow and others attempted to keep him ignorant of certain illegal activities primarily involving Lindenauer and Manes.

There was more than sufficient evidence, however, to support the jury's conclusion that Shafran had conspired to "participate . . . in the conduct of [the PVB's] affairs through a pattern of racketeering activity." 18 U.S.C. §1962(c). Specifically, there was ample evidence that Shafran, as Director of the PVB, knew that he was participating not merely in discrete bribery schemes, but more generally in the corruption that pervaded his agency. For instance, Sandow testified that on one occasion, Shafran stated his belief that Lindenauer was "taking from everybody." And both Lindenauer and Sandow testified that Shafran had asked each individually whether Sandow was paying cash bribes to Lindenauer. Although Shafran's inquiries prompted denials from both Lindenauer and Sandow, given Sandow's comment about Lindenauer and Shafran's own receipt of cash from Sandow, the jury was free to conclude that Shafran knew the truth. Accordingly, the jury could have concluded that, in accepting cash from SRS and the consulting contract from the BJV, Shafran knew that he was participating in a much larger effort to operate the PVB as a corrupt enterprise. That he might not have known many of the details of that larger effort is simply of no legal consequence.

Finally, Shafran contends that he was prejudiced by the district court's refusal to grant his motion for severance under Rule 14. Like Lazar, however, Shafran has failed to make a showing of prejudice. Because Shafran was properly found to be a member of a conspiracy to participate in the affairs of the PVB involving all of the defendants, the evidence used to prove that conspiracy was admissible against him. Moreover, the jury's acquittal of the alleged Candler Building bribes belies Shafran's claim of prejudicial spillover.

C. *The Citisource Bribes and Kaplan's RICO Convictions*

As explained *supra* (Background Parts A, B(5); Discussion Part A(2)), Kaplan was charged with, and convicted of, two RICO predicate acts: the payment of a bribe to Lindenauer in the form of Citisource stock and the payment of an identical bribe to Manes. Kaplan proffers two contentions as to why these bribes cannot support his RICO convictions. First, he argues that his transfer of Citisource stock to Manes and Lindenauer does not constitute two predicate acts under RICO because they were part of a single act or "criminal transaction" and could not be separately prosecuted or punished under New York law. Second, Kaplan argues that, even if the Citisource bribes were two predicate acts, they did not constitute a "pattern of racketeering activity." We find the first contention to be without merit but reserve decision on the second pending in banc review of a similar issue in an unrelated case.

1. *The Citisource Bribes as Two Predicate Acts*

New York's Criminal Procedure Law contains several provisions governing double jeopardy that "go[ ] much farther" and "provid[e] greater protections" than do the federal and New York Constitutions. N.Y. Crim. Proc. Law §40.10 practice commentary (1981). In contending that the Citisource bribes cannot constitute two predicate acts, Kaplan relies in part upon N.Y. Crim. Proc. Law §40.20(2) (McKinney 1981), which provides that in general "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal

transaction." A "criminal transaction" for the purposes of Section 40.20

> means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.

Id. §40.10(2). Kaplan submits that these provisions preclude the Citisource bribes from constituting separate predicate acts. He also contends that under N.Y. Penal Law §70.25(2) (McKinney 1987), which bars the imposition of consecutive sentences "on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other," the Citisource bribes are punishable only as a single offense and cannot constitute separate predicate acts.

However, state procedural rules such as those relied upon by Kaplan are irrelevant under RICO.[6] "[R]acketeering activity" under RICO includes "any act . . . involving . . . bribery . . . which is chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. §1961(1)(A) (Supp. IV 1986). In *United States v. Paone,* 782 F.2d 386, 393 (2d Cir.), *cert. denied,* 107 S. Ct. 269 (1986), 107 S. Ct. 3261, 3262 (1987), we observed that this language was "not intend[ed] to incorporate the various states' procedural and evidentiary rules into the RICO statute" but was instead "meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering charge." We thus held in *Paone* that the RICO statute did not incorpo-

[6]Because we hold the state procedural rules to be irrelevant, we do not reach the question of whether Kaplan's conduct would in fact be separately chargeable and punishable under state law. Accordingly, we deny Kaplan's motion for certification of that question to the New York Court of Appeals.

rate for purposes of a RICO predicate crime a New York rule forbidding convictions based on uncorroborated accomplice testimony. *Id.* at 394. In reaching this conclusion, we emphasized that "appellant's reading of 'chargeable' would result in precisely the same criminal act, proscribed by the laws of two states, being the basis of a RICO violation in one state but not in the other—simply because of differences in what are essentially procedural rules." *Id.* at 393.

Paone controls here. New York's rules governing double jeopardy and consecutive sentencing do not affect the generic definition of the crime of bribery. Instead, they are essentially procedural rules governing prosecutions for all crimes in New York. It is not disputed that the bribe to Lindenauer was chargeable and punishable under New York law, as was the bribe to Manes. Each was thus a bribe under New York's definition of bribery, even though they both could not be (we assume, *see supra* note 6) separately charged and punished. Because the definition of bribery is unaffected, the two bribes to Manes and Lindenauer remain "chargeable under State law and punishable" for the purposes of RICO and constitute separate predicate crimes. *See United States v. Licavoli,* 725 F.2d 1040, 1046-47 (6th Cir.) (murder and conspiracy to commit murder could serve as two separate predicate acts even though defendants could not have been charged with and punished for both crimes under Ohio law), *cert. denied,* 467 U.S. 1252 (1984).

2. *The Citisource Bribes as a Pattern of Racketeering Activity*

Having thus determined that the Citisource bribes properly constitute two predicate acts, we must reach Kaplan's alternative contention that the two Citisource bribes do not constitute a "pattern of racketeering activity" under 18 U.S.C. §1961(5) (1982). In making this argument, Kaplan relies heavily upon the now-famous footnote fourteen in *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479 (1985), in which the Supreme Court suggested in dictum that two predicate acts, while necessary to establish a pattern of racketeering activity, might not be sufficient to do so. *Id.* at 496 n.14; *see* 18 U.S.C. §1961(5) ("'pattern

of racketeering activity' requires at least two acts of racketeering activity"). In particular, Kaplan points to the *Sedima* footnote's quotation of the following language from the Senate Report on RICO:

> The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern.

473 U.S. at 496 n.14 (quoting, with emphasis added, S. Rep. No. 617, 91st Cong., 1st Sess. 158 (1969)). According to Kaplan, the Citisource bribes cannot constitute a pattern of racketeering activity because they arose from a single conversation with Lindenauer and were accordingly an "isolated incident" of "unitary character" lacking the "continuity" to which the footnote in *Sedima* referred.

Our full court has, however, on its own motion granted rehearing in banc in *United States v. Indelicato,* Nos. 87-1085, 87-1215 (2d Cir. argued June 13, 1988), to address a contention substantially similar to Kaplan's. Since the panel has found Kaplan's other claims regarding his RICO convictions to be without merit, *see supra* Parts A(2), C(1); *infra* Part D(1), we will reserve our decision on whether Kaplan's RICO convictions should stand until *Indelicato* is decided.

D. *The District Court's Evidentiary Rulings*

We now turn to several challenges by Kaplan and Friedman to the district court's evidentiary rulings. Kaplan contends that Judge Knapp erred when he admitted the testimony of Joseph Delario and two other Datacom executives, whose immunity agreements Kaplan claims constituted an invitation to perjury. Kaplan also argues that the district court should have excluded the testimony of the Datacom witnesses under Fed. R. Evid. 615 because two of the witnesses had read daily transcripts of the trial proceedings before agreeing to cooperate with the govern-

ment. In turn, Friedman contends that the district court erred by refusing to admit evidence that Donald Manes had lied about his January 1986 suicide attempt. Friedman also argues that the district court should have allowed him to subpoena Geoffrey Lindenauer's psychiatric records. We address these contentions seriatim.

1. *Kaplan: The Datacom Witnesses*

(a) *The Immunity Agreements.* Three Datacom executives—Joseph Delario, Neal Anderson and Robert Sargenti—testified for the government under grants of use immunity. The offers of immunity were made during the sixth week of the trial, after Lindenauer had testified and shortly before the government was scheduled to rest its case. The offers of immunity were contingent upon proffers of testimony that the government deemed truthful. Delario and Anderson had already testified before federal grand juries in three districts and had consistently denied that either they or Datacom had engaged in any wrongdoing. The government regarded this grand jury testimony as perjurious. At trial, the Datacom witnesses testified, among other things, as to how Kaplan had helped Delario bribe both Manes and Lindenauer in order to obtain a data-processing contract for Datacom.

Kaplan contends that the offer of immunity was "so coercive that it effectively rendered the [Datacom] witnesses unable to testify truthfully." He argues that the immunity agreements effectively protected the Datacom witnesses from the potential forfeiture of millions of dollars in a subsequent RICO prosecution. In Kaplan's view, the immunity agreements amounted to a huge contingency fee, and the resulting testimony thus constituted a denial of due process. The government contends that the effect of any immunity agreement or fee arrangement or testimony is an issue to be decided exclusively by a properly instructed jury. Our caselaw supports the government.

Even if the immunity agreements in this case are assumed to be as coercive as a contingency-fee arrangement, the testimony of the Datacom witnesses would not be inadmissible. *United States v. Persico,* 832 F.2d 705, 716-17 (2d Cir. 1987), a case

decided after the argument of these appeals, involved a witness who was promised a payment in an amount to be determined after the government's evaluation of the "overall quality" of cases brought as the result of that information and testimony provided by the witness. Like Kaplan, the appellants in *Persico* relied upon a now-overruled line of Fifth Circuit cases holding that, in certain narrow circumstances, contingeny-fee arrangements violate due process. *See, e.g., Williamson v. United States,* 311 F.2d 441 (5th Cir. 1962), *overruled in United States v. Cervantes-Pacheco,* 826 F.2d 310 (5th Cir. 1987) (en banc) (decided August 21, 1987, after main briefs had been filed but before argument in this case), *cert. denied,* 108 S. Ct. 749 (1988). In *Persico,* we expressed our "confidence in the jury's ability to assess counsel's arguments about the inherent unreliability of 'purchased' testimony, and to evaluate the witness' credibility accordingly." 832 F.2d at 717. We therefore held that "the credibility of the compensated witness, like that of the witness promised a reduced sentence, is for a properly instructed jury to determine." *Id.* (quoting *Cervantes-Pacheco,* 826 F.2d at 316).

Under our decisions, therefore, the question is whether the circumstances surrounding the agreements were aired before the jury, and whether the court gave proper instructions regarding the immunized witnesses' testimony. Here, through both direct and cross-examination of the Datacom executives, the jury learned in exhaustive detail about the witnesses' agreements with the government and about the potential financial ramifications of those agreements. In addition, defense counsel in their summations sharply challenged the credibility of the Datacom witnesses. As to the jury instructions, Kaplan contends that the district court did not give the jury sufficient guidance with respect to the immunity agreements. However, the careful and lengthy instruction given by Judge Knapp, set forth in the margin,[7] more than adequately advised the jury of the possible incentives created by the immunity agreements.

[7]The court's charge on the testimony of accomplices states in part:

(Footnote continued on following page)

(b) *The Reading of the Trial Transcripts.* Kaplan, also contends that the testimony of the Datacom witnesses should have been excluded under Fed. R. Evid. 615 because Delario and Anderson had read portions of the trial transcript prior to agreeing to cooperate with the government. This argument is meritless. Although the reading of testimony may violate an

(Footnote continued.)

> [T]he law imposes upon you stringent requirements as to how to evaluate [accomplice] testimony before concluding it to be reliable. Obviously, it's much more pleasant to be a witness than a defendant. The law requires that you scrupulously examine an accomplice's motives in persuading the Government to accept him as a witness rather than prosecuting him as a defendant. So, you can be sure that he's neither made up a story to incriminate someone nor colored the facts of an otherwise true story to make someone appear to be more guilty than he actually is.
>
> *I'm going to discuss with you in some detail the testimony of the Witness Lindenauer, not because I think his testimony is more important than any other witness—that is a question wholly within your province to determine—but simply because all attorneys in the case spent so much time on this particular aspect of his testimony that it lends itself to illustrating the principles involved.*
>
> In the first place, Lindenauer told you that he had lived a life characterized by acts of wrongdoing, many of which involved deception. This is obviously a factor you will take into account in determining the reliability of his testimony.
>
> In the second place, he was able to negotiate a plea which considerably reduced the total scope of the sentence that might have been imposed upon him had he been convicted of all his wrongdoings.
>
> And finally, he hopes, as he specifically told you, that the testimony he gave in this case will induce the judge before whom he pled guilty to be lenient in imposing sentence.
>
> These circumstances could have affected Lindenauer in at least three possible ways. *They could have caused him to make up imaginary facts in order to incriminate some or all of the defendants, or they could have caused him to color existing facts to make them appear to be more incriminating than they actually were.* Or, on the other hand, they might have caused him to conclude that his best hopes of salvation was to be able to convince the judge who ultimately sentences

(Footnote continued on following page)

order excluding witnesses issued by a district court under Rule 615, *see, e.g., Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1373 (5th cir. July 1981) (reading of testimony may be more harmful than watching it because reading enables witness to "thoroughly review and study [previous testimony] in formulating his own"), the exclusion of testimony is "'a serious sanction,' appropriate only where 'the defendants have suffered actual prejudice, and there has been connivance by the witness or counsel to violate the rule.'" *United States v. Jimenez*, 780 F.2d 975, 980 (11th Cir. 1986) (per curiam) (quoting *United States v. Blasco*, 702 F.2d 1315, 1327 (11th Cir.), *cert. denied*, 464 U.S. 914 (1983)). The decision whether or not to exclude testimony, moreover, is within the sound discretion of the trial judge. *See, e.g., United States v. Thomas*, 774 F.2d 807, 810 (7th Cir. 1985), *cert. denied*, 475 U.S. 1024 (1986). Because the government did not cause the Datacom witnesses to read the trial transcripts, and because the whole episode was revealed to the jury in defense counsel's attacks on the witnesses' credibility—*e.g.*, counsel for Friedman, referring to Delario's testimony in summation: "Did you hear that before? Does that have a certain ring to it? It has the ring of Geoffrey Lindenauer on the pages of the transcript that Mr. Delario so dutifully read."—we find no abuse of discretion in Judge Knapp's refusal to exclude their testimony.

2. *Friedman: The Impeachment of Manes*

Friedman's primary contention on appeal concerns the district court's refusal to allow the introduction of evidence that

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(Footnote continued.)

> him that he was scrupulously honest in his testimony before you.
>
> You should take account of these and any other possibilities that might occur to you in evaluating his testimony.
>
> *The foregoing principles apply in varying degrees to all so-called accomplice witnesses. Some face sentences and some testified under grants of various types of immunity, which greatly reduced the possibility of their ever being prosecuted. They all, in one way or another, could conceive it to be in their own best interest to achieve and retain the good will of the government.*

Donald Manes had lied to law-enforcement authorities about his attempt in January 1986 to take his own life. Because Lindenauer testified to numerous hearsay statements by Manes admitted as declarations of a co-conspirator in furtherance of the conspiracy under Fed. R. Evid 801(d)(2)(E). Friedman argues that the exclusion of this evidence violated Fed. R. Evid. 806, which authorizes the introduction of evidence attacking the credibility of a hearsay declarant. We believe the evidence was properly excluded because it was simply not probative on the issue of the credibility of Manes's conspiratorial statements to Lindenauer.

In the early morning hours of January 10, 1986, aware that federal authorities were investigating his dealings with the PVB, Donald Manes was seen driving erratically on the Grand Central Parkway by police officers. Bleeding from slash wounds in his left wrist and left ankle, Manes was taken to a hospital in Flushing. While at that hospital, the Queens Borough President explained his wounds by telling investigators that two men hiding in the rear seat of his automobile had abducted him when he left Queens Borough Hall on the evening of January 9. On January 21, however, after having been transferred to a hospital in Manhattan, Manes read to reporters at his bedside a short statement in which he admittd that his wounds were self-inflicted and that he had fabricated the story of his abduction.

At trial, Friedman sought to impeach the credibility of the late Manes's hearsay declarations by presenting evidence of this false story. Specifically, Friedman offered the testimony of a Queens County assistant district attorney to whom Manes had lied, along with a videotape of Manes reading his public statement.

The district court excluded the proffered evidence because it had no probative value and might confuse the jury. *See* Fed. R. Evid. 403 (relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"). The district judge announced that "I don't see what [Mane's abduction story] has to do with this case," and pointed to the fact that, when the jury was being selected, he had asked each pro-

spective juror to "accept my representation that Manes' suicide has nothing whatever to do with this case."

Rule 806 of the Federal Rules of Evidence provides that "[w]hen a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarent may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." Fed. R. Evid. 806. As the advisory committee's note explains, "[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609." *Id.* advisory committee's note. In turn, under Rule 608(b), "[s]pecific instances of the conduct of a witness . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning the witness' character for truthfulness or untruthfulness." Fed. R. Evid. 608(b). Friedman argues that the district court was required to admit evidence of Mane's false abduction story because Manes could have been cross-examined on the subject under Rule 608(b) if he had lived to testify at the trial. Specifically, Friedman emphasizes that, had Manes testified, defense counsel could have sharply attacked the Queens Borough President's credibility by asking him "questions about his criminally mendacious attempt to shift the responsibility to others for his self-inflicted wounds."

Rule 806 does not set forth a test of probative value but rather states generally the type of evidence that may be used to undermine hearsay declarations.[8] Specific issues of whether a

[8]The government does not argue, as it did below, that the Manes videotape was inadmissible under Rule 806 as the result of Rule 608(b)'s provision that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." Fed. R. Evid. 608(b). That rule limits such evidence of "specific instances" to cross-examination. Rule 806 applies, of course, when the defendant has not testified and there has by definition been no cross-examination, and resort to extrinsic evidence may be the only means of presenting such evidence to the jury.

declarant's past conduct may actually "cast doubt on the credibility of [his] statements," *United States v. Serna*, 799 F.2d 842, 850 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1887 (1987), must be determined by comparing the circumstances of the past conduct with those surrounding the hearsay statements admitted into evidence. Such assessments, like determinations of relevance and rulings as to the proper scope of cross-examination, must be left to the "broad discretion" of the trial judge, "and we will not overturn an exercise of that discretion absent a clear showing of abuse," *United States v. Bari*, 750 F.2d 1169, 1178 (2d Cir. 1984), *cert. denied*, 472 U.S. 1019 (1985).

Judge Knapp certainly did not abuse his discretion here. The evidence of Mane's false abduction story had no conceivable bearing upon the credibility of his statements to Lindenauer in furtherance of the conspiracy. When Manes was found badly wounded on that early January morning, he was a distraught man whose life was soon to be shattered by the government's investigation. Lindenauer thus testified that, as the investigation closed in around them, an uncharacteristically "nervous" and "erratic" Manes had suggestd to Lindenauer the possibility of suicide to avoid prosecution. Mane's false account of his suicide attempt was obviously intended to conceal his consciousness of guilt in the face of the ongoing investigation. To suggest, as does Friedman, that this pathetic incident demonstrates that Manes as a general matter "falsely blamed others for causing his wounds"—as if Manes had specifically accused someone as an abductor in his false explanation of his wounds—is fanciful. There is simply no merit to the suggestion tha the incident casts doubt upon the credibility of Mane's conspiratorial declarations. Those statements, which were in futherance of the conspiracy, were not attempts to shift blame fom Manes to others but directly implicated him as well as the others. Admission of the testimony and videotape, moreover, would necessarily have injected Mane's subsequent suicide into the heat of the case as evidence of the guilty state of mind that caused him to lie on the earlier occasion. There was thus no error in its exclusion.

We note as well that Judge Knapp was not insensitive to the commands of Rule 806. He thus properly allowed Friedman to introduce evidence attacking the credibility of a statement that Manes had made to Lindenauer thirteen years earlier about the source of the $25,000 Manes had invested in Lindenauer's psychotherapy clinic. Friedman claims that this evidentiary ruling is inconsistent with the ruling on the abduction story because the psychotherapy-clinic episode was more remote in time. The two rulings are entirely consistent, however, because the evidence concerning the $25,000 payment, unlike the evidence about Mane's suicide attempt, directly involved the credibility of Mane's out-of-court statements to Lindenauer.

3. *Friedman: Lindenauer's Psychiatric Records*

The late Borough President's importance at trial stemmed not so much from what he said as from what he did, while Lindenauer's credibility was at the heart of the verdicts. Friedman accordingly contends that the district court committed reversible error when it quashed trial subpoenas issued to two psychiatrists who had treated Lindenauer. Again, we disagree.

On June 2, 1986, Friedman issued trial subpoenas pursuant to Fed. R. Crim. P. 17(c) to Herbert Kalmanoff, M.D., and John Diamond, M.D., directing them to produce "[a]ll medical and psychiatic records relating to Geoffrey Lindenauer." Lindenauer immediately intervened and moved to quash the subpoenas on the ground that they violated the psychotherapist-patient privilege. The district court thereupon conducted an examination in camera of materials produced by Dr. Kalmanoff. These included a letter of recommendation written by Dr. Kalmanoff on behalf of Lindenauer and Dr. Kalmanoff's handwritten notes of his psychotherapy sessions with Lindenauer held between November 1970 and January 1984. After inspecting the documents, the district court granted Lindenauer's motion to quash with respect to Dr. Kalmanoff's notes on the ground that they were privileged. *United States v. Friedman*, 636 F. Supp. 462 (S.D.N.Y. 1986) Relying upon his examination of the notes and upon our decision in *In re Doe*,

711 F.2d 1187, 1193-94 (2d Cir. 1983), Judge Knapp concluded that

> the material here subpoened contains the type of intensely personal communications that the psychotherapist-patient privilege is designed to protect. The notes contain extremely personal statements made by the patient, recollections of past experiences, notes of dreams, as well as observations of the patient by the doctor. It is clear that a real, lasting and professional psychotherapist-patient relationship existed between Lindenauer and his doctor. Further, unlike [*United States v.*] *Lindstrom*, [698 F.2d 1154 (11th Cir. 1983),] nothing in our investigation of these materials suggests to us any impediment to Lindenauer's ability to know, comprehend and relate the truth.

636 F. Supp. at 463.

Having ourselves examined Dr. Kalmanoff's notes under seal, we agree with Judge Knapp that a true psychotherapist-patient relationship existed and that nothing in the psychotherapist's notes casts any doubt upon Lindenauer's ability to understand and relate the truth. We need not, however, address either Judge Knapp's conclusion that the notes were priviliged or the broader question left upon in *Doe*, namely whether we should recognize a psychotherapist-patient privilege. We are confident that even if the Kalmanoff notes were not privileged and the quashing of the subpoena was error, the error *was harmless* beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). The notes contain little, if any, material that would have been useful in cross-examining Lindenauer. Indeed, Judge Knapp also found that he would not have permitted use of the notes at trial "regardless of any claim of privilege." 636 F. Supp. at 462.

"Moreover, whether or not the notes were relevant, if admitted they could not have had even a marginal impact upon the jury's assessment of Lindenauer's credibility. In particular, Lindenauer's guilty plea and the pendency of his sentencing were brought out on direct examination. Defense counsel also

cross-examined Lindenauer on numerous acts of dishonesty he had committed that were completely unrelated to his crimes at the PVB. Lindenauer was asked, for example, about his purchase of two fraudulent graduate degrees, about his operation of a sham psychotherapy clinic, about his having sexual relations with patients at that clinic, and about whether negative publicity surrounding sexual practices at his sham clinic had resulted in its closing. Thus, "[i]f [Lindenauer] was an otherwise unimpeached witness, [his] psychiatric history might have been of some value to the defense other than as a legal point to be preserved for an appeal, but he wasn't and it isn't." *United States v. Bari*, 750 F.2d at 1179. In addition however unsavory Lindenauer might have appeared to the jury, his story on the witness stand was corroborated in many important respects by other witnesses, including Joseph Delario, Robert Richards and Dr. Jerome Driesen. Accordingly, any error in quashing the subpoena of Lindenauer's psychiatric records was harmless.

E. *Friedman's Ineffective Assistance Claim*

We turn next to Friedman's claim that he was denied his sixth amendment right to the effective assistance of counsel. Friedman contends that his trial counsel, Thomas P. Puccio, "sidestepped crucial lines of cross examination" because of conflicts of interest resulting from Puccio's representation of Robert Richards, an indicted co-conspirator, from his representation of Melvin Lebetkin, an unindicted co-conspirator, and from his alleged representation of a third person, a lawyer named Harold Borg. We conclude that Friedman knowingly waived the first alleged conflict and that the other two alleged conflicts were not conflicts at all.

1. *Richards and Lebetkin*

Robert Richards, formerly president of Citisource, testified for the government at trial. Before he agreed to cooperate with the government and when he gave testimony at trial, both Richards and Citisource had been represented by Puccio and Puccio's law firm, Stroock & Stroock & Lavan.

Citing our decision in *United States v. Iorizzo*, 786 F.2d 52 (2d Cir. 1986), and realizing that any conviction it might obtain against Friedman would be at risk, the government moved on May 8, 1986 to disqualify Puccio. The government's motion stated that Richards had pleaded guilty to federal bribery charges and was expected to testify at trial. The motion also set forth relevant facts concerning Puccio's previous representation of Richards and stated that Puccio had also represented Melvin Lebetkin, an attorney who was being investigated for allegedly paying bribes to Manes and Lindenauer on behalf of yet another PVB vendor, the Standard Collection Agency. In a sealed affidavit, the government stated that Puccio had attempted to gain immunity for Lebetkin by proffering testimony. No such agreement, however, had been reached, although the government stated that it had continued to express an interest in obtaining one. The government speculated that Lebetkin's testimony would harm Friedman by tending to corroborate Lindenauer's testimony regarding Manes.

Friedman vigorously opposed the government's disqualification motion. In an opposing affidavit, Puccio questioned the government's good faith in filing the motion, suggesting that it was merely an attempt to delay the trial. Puccio emphasized that the Stroock firm had represented Richards in its role as corporate counsel to Citisource, and that "[a]t no time did I confer privately with Mr. Richards or provide him personally with legal advice." Puccio's affidavit also pointed out that when the New York County District Attorney had announced on February 18, 1986 that several officers of Citisource, including Richards, were targets of investigation, Puccio had immediately recommended that each of the Citisource officers obtain independent counsel. Puccio stated as well that there was "no realistic possibility that I would be either a sworn or unsworn witness at the trial." With respect to Lebetkin, Puccio stated that Lebetkin's and Friedman's "respective relationships with Lindenauer are totally distinct from one another," and that accordingly no conflict of interest existed.

Friedman himself submitted an affidavit in opposition to the government's motion. It stated:

STANLEY M. FRIEDMAN, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and a defendant in this criminal proceeding which has been scheduled for trial before this Court on or about June 2, 1986.

2. In January of this year, I retained Thomas P. Puccio, Esq. to represent me in connection with criminal investigations undertaken by the District Attorney of New York County and the United States Attorney for the Southern District of New York.

3. Since January 1986, I have spent hundreds of hours with Mr. Puccio discussing this case; I have paid to Mr. Puccio substantial legal fees; I have the fullest confidence in Mr. Puccio's ability to represent me; I enjoy an excellent client-attorney relationship with Mr. Puccio. In light of the foregoing, I believe that not to be able to continue in this case with Mr. Puccio as my attorney would cause me irreparable harm. Furthermore, I would lose my right to a speedy trial.

4. I have read the conflict charges submitted by the United States Attorney against Mr. Puccio. I have also read Mr. Puccio's affidavit in opposition, and related documents, including the May 8, 1986 Transcript of Proceedings before this Court.

5. In addition thereto, I have obtained the advice of independent counsel (although I, too, am a practicing attorney) who concurs with me that there is no conflict of interest in Mr. Puccio continuing to represent me. However, if the government's position is correct, I waive the benefit of any purported conflict.

WHEREFORE, based on the foregoing, I respectfully request that this Court deny the government's motion to disqualify my attorney, Thomas P. Puccio.

The district court conducted a hearing on the disqualification motion, at which Puccio represented that he had no intention of cross-examining Richards about his testimony before

the SEC, because to do so would, as the district court put it, "open the floodgates" to a redirect examination in which Richards would be asked why he had denied before the SEC any criminal wrongdoing on behalf of Citisource. An anticipated area of inquiry on such a redirect examination concerned implied threats upon Richard's life allegedly made by Friedman through a lawyer who represented Lazar at trial. (Lazar has new counsel on appeal.) The district court, after observing that if Puccio were to cross-examine Richards, "he shouldn't be disqualified, he should be disbarred," asked both Puccio and Friedman their views on the matter:

> The Court: Do you stipulate that you will not—
>
> Mr. Puccio: Cross-examine him on that point?
>
> The Court: Cross-examine him in any way to bring out the fact that he testified inconsitently before the SEC.
>
> Mr. Puccio: Yes, I will stipulate, I have no problem with that.
>
> The Court: Does Mr. Friedman agree to that?
>
> Defendant Friedman: Yes, your Honor, I agree with Mr. Puccio's position on the cross-examination of Mr. Richards.
>
> Mr. Roth:: [for the government]: If I could interject for a moment? Assuming we are going to try a waiver, [*United States v.*] *Curc*[*i*]*o*[,] [680 F.2d 881 (2d Cir. 1982),] set out very explicit procedures for that.
>
> The Court: *Curcio* wasn't talking about a defendant who was a lawyer and a waiver which, as I said before, if it wasn't made Mr. Puccio shouldn't be disqualified. Anybody representing Mr. Friedman who brought up this SEC testimony in light of what you said you would do when it was brought up would be a certified idiot. So I don't have to have Mr. Friedman, who is a lawyer, consult another lawyer to find out whether it is all right not to have his lawyer be a certified idiot.

The court denied the government's motion on May 21.

Friedman, who once served as an Assistant District Attorney for Bronx County, now claims that he did not validly waive any conflict of interest arising from Stroock's representation of Richards. Specifically, Friedman contends that his waiver did not meet the standards set forth by this court in *United States v. Iorizzo*, 786 F.2d at 59, and *United States v. Curcio*, 680 F.2d 881, 888-90 (2d Cir. 1982), and that his background as a lawyer is irrelevant to the determination of whether his waiver was "knowing and intelligent." We disagree.

In *Curcio*, we established procedures to be followed by trial courts in determining whether a criminal defendant has knowingly and intelligently chosen to waive his right to be represented by an attorney who is free from conflicts of interest. We noted that the "first task of the trial court is to alert the defendants to the substance of the dangers of representation by an attorney having divided loyalties in as much detail as the court's experience and its knowledge of the case will permit." *Id.* at 888. We stated that the court must then "assess whether the [defendant's] request is . . . knowing and intelligent," *id.*, and that "the court may perhaps devise a variety of methods for gaining the necessary insights." *Id.* at 889. Nevertheless, analogizing to Fed. R. Crim. P. 11, we observed that "questions designed to elicit from the defendant a narrative statement of his understanding are preferable to questions designed to elicit mere 'yes' or 'no' answers." *Id.* We also noted that "the court's inquiry in each instance should take place after the defendant[] ha[s] had a reasonable time to digest and contemplate the risks posed by [the conflict of interest.]" *Id.*

Though we described our decision in *Curcio* as "prescrib[ing] [a] catechism," *id.* at 890, we nevertheless recognized that the existence of a knowing and intelligent waiver "depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused,'" *id.* at 888 (quoting *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (citations omitted)). Under the circumstances of Friedman's case, we have little difficulty in finding a knowing and intelligent waiver despite the departure from the full-blown *Curcio* cathechism. First, Friedman had

ample time and opportunity to "digest and contemplate" the risk posed by his continued representation by Puccio. The government's disqualification motion was filed nearly a week before the hearing was conducted. Friedman thus was not, like the defendants in *Curcio,* forced into a snap decision during a lunch break, *see id.* at 889, or like the defendant in *Iorizzo,* compelled to make a choice "on the spot" in the middle of a trial. 786 F.2d at 59; *see id.* at 55-57. Second, Friedman's affidavit stated that he had read the government's submissions and Puccio's response and that he had consulted with independent counsel. He had thus clearly been alerted to the substance of the dangers of representation by Puccio. In addition, Friedman was present throughout the May 14 hearing, which included a long discussion during which the government represented that, if cross-examined on his SEC testimony, Richards would testify on redirect that his SEC testimony resulted from "intimidation he felt from Friedman." Finally, Friedman was a lawyer who had already devoted "hundreds of hours" to the preparation of his defense. We therefore conclude without difficulty that his waiver was knowing and intelligent. We emphasize, however, that departures from the procedures outlined in *Curcio* and *Iorizzo* may be justified only in unusual circumstances, such as those in the instant case.

With respect to the alleged conflict of interest involving Puccio's representation of Lebetkin, Friedman contends that Puccio cross-examined Lindenauer "in a truncated fashion" and declined any cross-examination of Sandow in order to avoid the possibility that either witness might give public testimony incriminating Lebetkin. Puccio, however, did ask Lindenauer about the amount of the bribes he received from Lebetkin's firm, Standard Collection Agency. Although Friedman notes accusingly that Puccio mention[ed] Lebetkin's company only in passing and never mention[ed] Lebetkin himself," we fail to perceive and Friedman fails to explain, what purpose any further questioning about the subject would have served. The questions abut Standard Collection Agency were relevant only to show Lindenauer's propensity to take bribes and to test Lindenauer's memory of corrupt transactions. Puccio's representa-

tion of Lebetkin could not have affected other aspects of Puccio's cross-examination of Lindenauer.

As to Puccio's failure to cross-examine Sandow, Sandow's testimony did not incriminate Friedman and mentioned him only in passing. Sandow's testimony primarily concerned Shafran, and thus only Shafran's lawyer bothered to cross-examine. Moreover, very little of Shafran's cross-examination of Sandow concerned Sandow's dealings with Lebetkin. In view of the marginal relevance of Lebetkin and Standard Collection Agency to this case, let alone to Friedman's guilt, we fully agree with Puccio's original assessment that "a lawyer representing both [Lebetkin and Friedman] would not be required at a joint trial to take contradictory positions in defending both of them." In sum, with respect to Puccio's representation of Lebetkin, Friedman has failed to show either an "actual conflict of interest," *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980), or a "lapse in represenation," *Iorizzo*, 786 F.2d at 58 (quoting *Cuyler*, 446 U.S. at 349), that together would constitute a denial of his sixth amendment rights.

2. *Borg and the Driesen Tape*

Friedman's last claim of ineffective assistance arises out of a curious incident. One week before opening arguments at the trial, the government revealed to the district court and to Friedman that one of its witnesses, Dr. Jerome Driesen, had surreptitiously tape-recorded a meeting attended by Puccio and another attorney, Harold Borg, on June 3, 1986. Driesen, who at the time of the June meeting was cooperating with federal authorities, engineered the recording with the assistance of the FBI. According to the government, the meeting had been arranged after Borg had offered to help Driesen obtain secret information about an investigation being conducted by a Queens County grand jury. According to Puccio, the meeting had been arranged because Puccio, who needed material with which to impeach Lindenauer, had been told that Driesen, a forensic psychiatrist and long-time friend (and accomplice) of Lindenauer, believed that Lindenauer was mentally imbalanced.

At the recorded meeting, Puccio and Borg attempted to persuade Driesen that it was in Driesen's interest to provide Puccio with information impeaching Lindenauer. They told Driesen that they had heard that, as the result of Lindenauer's testimony, Driesen had been named in a sealed indictment by the Queens grand jury. Though he feigned ignorance, Driesen, who had signed a cooperation agreement with the Queens County District Attorney, already knew that he had been indicted. Borg and Puccio argued that the Queens County indictment might never be unsealed if federal prosecutors were unsuccessful in building the instant case around Lindenauer. Puccio accordingly asked Driesen throughout the meeting whether Lindenauer had "severe emotional problems" and whether Driesen knew other things that might help Puccio undermine Lindenauer on the witness stand.

Each time the topic of discussion turned to Lindenauer, however, Driesen—who had been instructed by the FBI not to discuss either Lindenauer or the *Friedman* case with Puccio—would change the subject, otherwise act unresponsively or give Puccio answers that were inconsistent with the testimony he later gave at trial. For example, at several points during the meeting, Driesen would avoid discussing Lindenauer by asking Borg and Puccio whether it would be possible to obtain firmer information about the Queens County investigation. At other points, Driesen would answer inquiries about Lindenauer with responses such as "You're asking me to what? I, uh, to say that he has severe emotional problems?" and "I don't know what it is you want me to say about Lindenauer." At one point, in response to a direct question from Puccio, Driesen denied having any connection with Lindenauer's and Manes's attempt to acquire an ownership interest in a psychiatric hospital in Queens through extortion. At trial, Driesen testified to the contrary, and stated that he had pleaded guilty to state misdemeanor charges in connection with the scheme. At least twice during the meeting, Puccio stated that all he wanted was to know the truth about Lindenauer. Puccio also asked Driesen if the room in which they were meeting, Driesen's office, was bugged.

Toward the end of the meeting, after Borg had pulled Driesen aside, Driesen told Borg:

> What? Look who's talking. Look, listen to me for a second HAROLD, just lemme talk for one second. Uh, my feeling is, my feeling is that he [presumably Puccio] wants me to say things that are uh, that are not true, and I am uh, I don't know if this whole thing isn't bullshit, I don't know if the whole thing is bullshit HAROLD, I, don't [unintelligible] get me, tell me, questions, give me the questions, give me the answers, give me the uh, uh, what does an indictment have, it has numbers on it, gimme the numbers of the indictment, show me something that is true, HAROLD, because this is bullshit. I think that I'm being, how do I know that I'm not just being scared by him to make his case?

After an unintelligible response from Borg, the FBI's tape reveals that Driesen then asked Borg: "[W]hat does he want me to say?" According to the transcript, Borg's reply was: "[unintelligible] not interested in that right now." And the last portion of the transcript of the tape reads as follows:

HB [Borg]: Who's the [unintelligible]

JD [Driesen]: What, yeah, bugged. Goodnight.

(BACKGROUND NOISES).

JD: Who is it?

(BACKGROUND NOISES).

JD: You see, you see two tricky guys playing chess? You see, uh, lemme shut everything off, lemme shut this off.

KS: This is Special Agent KEN ST. GERMAIN, the sound that [uninteligible]

JD: That's uh, running. Put if off, it's running. I think it's got a pause button.

KS: [unintelligible]

JD: I don't, anybody . . .

KS: [unintelligible]

KS: The time is now 11:14 P.M., June 3, 1986, and I'm going to deactivate this recorder.

JD: [unintelligible] Whoever said he's not a sharp guy, PUCCIO, uh, did you, did you see us pussyfooting in there?

KS: Yeah.

JD: What does he want me to say? And, you know, he wants me to say he's crazy?

(END OF CONVERSATION).

At the September 24 hearing, which was held in camera, Puccio expressed his outrage at his having been taped by the government. He accused the government of having "tried to set me up," an understandable reaction in light of the fact that some of Driesen's responses might readily be interpreted as inviting Puccio to suborn perjury. The United States Attorney, Rudolph W. Giuliani, denied this accusation, claiming that "[t]he subject of this investigation was Mr. Borg, not Mr. Puccio." Giuliani claimed that the government had been investigating Borg for obstruction of justice and had been also seeking to determine how Borg had acquired secret information about the state grand jury testimony of the government's star witness, Lindenauer. Puccio, however, stated that Driesen's indictment had been leaked to the press by the Queens District Attorney and was all but common knowledge. Giuliani further stated that although

> there was a period of time in which Mr. Borg was representing that Mr. Puccio could do things which under one interpretation could be considered to be improper or criminal[,] [w]hen we reviewed that tape we came to the conclusion that there was no such conduct, and closed, even if you want to call it that, any investigation of Mr. Puccio. And that's months ago.

Giuliani explained that the government had revealed the existence of the tape because Driesen might be called to testify, and that while "[w]e don't think it bears on the trial [or is] relevant to cross-examination," the government thought it would be "fair for [Puccio] to know [about the tape] when he cross-examines Mr. Driesen [sic]." Judge Knapp expressed his view that the tape was irrelevant to the trial. After Puccio

vowed that he would complain to the Director of the FBI, the matter was seemingly dropped.

The tape recording surfaced once again as an issue during trial, however, on October 23, the day before Driesen originally was scheduled to testify. Puccio expressed the view that if Driesen's credibility were brought into question, Friedman should be allowed to present evidence that Driesen had lied during the recorded meeting when asked about Lindenauer and the instant case. But because Puccio, as a witness to that meeting, could not "bring that out," Puccio argued that Driesen's testimony should be excluded in light of the government's failure to try to disqualify Puccio once it had decided to use Driesen's testimony. *See, e.g., United States v. McKeon*, 738 F.2d 26, 34-35 (2d Cir. 1984); *United States v. Cunningham*, 672 F.2d 1064, 1074-75 (2d Cir. 1982). Giulliani responded by arguing that Driesen "wasn't lying. . . . He was doing precisely what he was instructed to do by the FBI, which was not to get into discussions about Geoffrey Lindenauer or the case." Giuliani also stated shortly thereafter that Driesen "lied in the sense he was a cover, undercover agent, [in] the way an undercover agent is instructed to lie," but that "of course we didn't instruct Driesen to lie. Judge Knapp concluded that even if Driesen "would lie in that situation," that fact would have at most a "piddling" impact upon Driesen's credibility.

On October 28, 1986, just before Driesen took the stand, Puccio again argued vigorously for the exclusion of Driesen's testimony on the ground that the recorded conversation constituted valuable impeachment evidence that Friedman could not use. In particular, Puccio speculated that Driesen, for reasons of his own, had "lied to them [the government] when he said that Harold Borg was going to supply him or talked about supplying him with Grand Jury material." The district court, however, rejected Puccio's arguements, observing that the Driesen tape "doesn't strike me . . . as very persuasive impeachment." The court added that "I think you would be foolish to bring it out. . . . But you made a beautiful record."

From these curious facts now comes a curious appellate claim: In a convoluted attempt to invoke our decision in *United States v. Iorizzo*, Friedman asserts that Puccio may

have been representing Borg while representing Friedman during the trial in this case. According to an affidavit filed by Friedman in the district court in conjunction with a motion subsequent to this appeal for a new trial, Puccio had represented Borg in a criminal investigation at one time. Whether that representation continued through the trial of the instant matter is not clear.

However, even assuming that Puccio had represented Borg at the perfect time, and that cross-examination of Driesen with regard to the June 3 meeting would have been adverse to Borg's interests (an heroic assumption), we fail to perceive a conflict of interest. Specifically, we fail to see either (1) how the taped meeting could have been used to bolster Friedman's defense or (2) how the existence of the tape or of the taped meeting itself could have affected Puccio's conduct of that defense. Any attempt to use the Driesen tape was obviously fraught with risk for Friedman and would have surely been, as Judge Knapp put it, "foolish." Driesen's credibility would not have been damaged by evidence of dissembling when he was operating under the FBI's instructions. Instead, cross-examination of Driesen about the events of June 3 would likely have done nothing except bring to the jury's attention the fact that the government had at one point decided to investigate Friedman's lawyer. If that fact would have had any effect on the jury, it probably would have prejudiced the defense.

Moreover, even the most cursory examination of the record reveals a much sounder reason for Puccio's failure to cross-examine Driesen than a supposed conflict of interest. Cross-examination was unnecessary. A number of far more cogent impeaching facts were elicited by the United States Attorney in his direct examination of Driesen. Specifically, Driesen had pleaded guilty to federal and state charges relating to his friendship with Lindenauer. He had in the recent past habitually used cocaine. He had also served as the psychiatric consultant to Lindenauer's sham clinic and had allowed Lindenauer, whom he knew held only a phony Ph.D., to use his office to treat patients. In addition, Driesen's testimony, which largely recounted conversations with Lindenauer about Manes, was cumulative. All defense counsel thus simply made light of Drie-

sen's testimony by not even bothering to question him. Accordingly, we conclude that the Driesen tape would have been of no use to Friedman's defense, and that there was thus neither an actual conflict of interest nor a lapse in Puccio's representation of Friedman.

F. *The District Court's Publicly Reported Assessment of Friedman's Credibility*

Friedman's next claim concerns another unusual incident, one that occured in Judge Knapp's robing room during the seventh week of trial. This incident involves a publicly reported comment made by the district judge about Friedman's testimony. Friedman claims that the judge's comment requires either dismissal of indictment or a new trial. This claim is both waived and meritless.

On the morning of November 11, 1986, Friedman took the witness stand in his own defense. After denying all of the government's charges against him, he testified at length about his career as a lawyer and a politician, emphasizing, for example, his continuing membership in the Democratic National Committee and his reelection during the week before trial as Chairman of the Bronx County Democratic Committee. In addition, Friedman testified that, among other things, he had represented the Kaplan Group in connection with its attempt to obtain and fulfill a PVS contract to develop a hand-held computerized device that would issue parking tickets. While admitting that Kaplan had given him three 50,000-share blocks of stock in Citisource, Friedman claimed that he had intended to give two of the blocks to his children, but had decided not to put the stock in his children's names because he believed that others might conclude he was attempting to conceal his own ownership.

The government's cross-examination of Friedman began late in the afternoon but was interrupted when defense counsel objected to the government's attempt to cross-examine Friedman about his representation of clients before City agencies (other than the PVB) in which he held patronage power. The haggling over the scope of cross-examination continued the next morn-

ing in Judge Knapp's chambers. The government argued that Friedman's lobbying efforts constituted extortion and were relevant to impeaching Friedman's claim that he was an honest politician. *See* Fed. R. Evid. 608(b). Defense counsel argued that evidence of Friedman's lobbying efforts was irrelevant and prejudicial. After extensive discussion, Puccio asked the district court to defer its decision on the scope of cross-examination. The following colloquy took place:

> [Mr. Puccio]: Judge, can I make a suggestion? Why—could you ask the United States Attorney to question him about the case here first, and then after that, make this decision? I think that's a fairer way.
>
> The Court: What's this?
>
> Mr. Puccio: Could you request that the United States Attorney defer this and question him about what's involved here? Maybe you'll decide after that he doesn't need all this.
>
> The Court: I can't tell the United States Attorney how to try the case. I know how I would if I were doing this. I wouldn't do all this bullshit.
>
> Mr. Puccio: If you wouldn't do all this bullshit, I don't think you should permit him to do it.
>
> The Court: I'm not trying the case. I wouldn't do it because I think it's illegal. I think it's a waste of God damn time.
>
> Mr. Puccio: I think's its highly prejudicial to my client.
>
> The Court: *With the highly improbable story that your client told, I think that should be what we're talking about, not this bullshit. But that's neither here nor there.*

(emphasis added).

Representatives of the press attending the session in the robing room heard this remark as it was made. After Puccio expressed concern about the comment, Judge Knapp asked the

media representatives who were present to refrain from reporting it, stating:

> I can't ask you to make any commitment to me. That's way beyond my province. I point out I think it would be very unfortunate and very unfair to Mr. Friedman if that should bet [*sic*]—just as it was unfair to the Government—to have that newspaper account that said I said that Lindenauer is a liar, which I didn't say. But I'm not so concerned about fairness in Government as I am about fairness to the defendant. I made a mistake, and if you exploit it, it's just unfair to the defendant, and I think maybe you wouldn't want to do that.

The judge's comment about Friedman's "highly improbable story" was nevertheless widely reported in New York City.

Following the robing room session, Judge Knapp agreed in open court to give the jury a cautionary instruction based upon a proposal Puccio had submitted. The jury was then brought in, and the United States Attorney resumed his cross-examination of Friedman. At the end of the morning session, Judge Knapp instructed the jury as follows:

> Ladies and gentlemen, this is the time for my usual homily about newspapers and radios. It becomes pertinent now because I understand now . . . the local radio may have started picking up bulletins from this trial.
>
> . . . A discussion may be going on [among] three or four people for a half hour or so, and in the course of it, somebody may say something which is quoted. [A]nd anybody who had been at the conference may not even—not remember it was said, because it obviously had no meaning. But all by itself, it could sound as though it had meaning.
>
> And this is particularly pertinent [to] any conversation that Mr. Puccio and I may have engaged in, because we get under each other's skin.

* * *

I might have well said Point A, and then half a dozen times after said B, and whoever was listening thought A was more noteworthy, newsworthy, and so A goes out on the television or these bulletins. You can see the newspaper usually puts in qualifications, but bulletins just put in what you get.

So if you ever hear any bulletin that anybody here, myself or anybody else, made some statement about the case, just assume that the statement was wrong. I'm not saying that you can assume that the statement wasn't made, but the statement may or may not have been. But assume that the statement didn't mean what it appears to mean in that three seconds it's allowed on a bulletin—in a three second quote.

So I'll see you at quarter past 2:00.

(emphasis added).

After the jury had left the courtroom, the following exchange took place:

Mr. Puggio: Judge, if I may, with respect to Your Honor's instruction, *and purely for the record,* and the last thing that Mr. Friedman desires here is a mistrial, but for the record, I think in light of the in-chambers conference, that we have to make that application. *It may be premature, but I want to protect the record.*

The Court: What application do you want?

Mr. Puccio: *I said for the record, I would make an application for a mistrial.*

The Court: *If you want a mistrial, make a mistrial. If you don't want a mistrial, don't make an application. If the application is made, I've got to rule on it. I don't rule on things that are made for the record.*

Mr. Puccio: *Let me think about it, Judge, and see what—*

The Court: All right.

(emphasis added). The court then recessed for lunch, after which the United States Attorney continued his examination of Friedman.

On the next morning, before the jury was brought in, Puccio told the district court that "my comments before lunch period yesterday were somewhat premature. I still think any kind of motion is premature." Puccio nevertheless stated that "in light of the tremendous publicity that remark got, . . . I think it's incumbent upon the Court [to] spend [ ] a half hour to individually talk to each juror and see if anybody heard anything about this." After some discussion, Judge Knapp, the lawyers and the defendants agreed that Judge Knapp would conduct a *voir dire* of each juror in his robing room.

In the robing room, in the presence of only his two law clerks, a court reporter, Puccio and the United States Attorney, Judge Knapp asked each juror individually if he or she had read or heard anything about the case in the previous twenty-four hours. None of the seventeen Hartford-area jurors had read or heard of the district court's comment, and when proceedings resumed in open court, Puccio made no mention of any motion for a mistrial or other relief. No mistrial motion was ever made.[9]

There can be little question that Friedman's considered decision not to seek a mistrial constitutes a waiver of any claim that he was prejudiced by Judge Knapp's comment.[10] In *United States v. Dukes*, 727 F.2d 34, 40 (2d Cir. 1984), for ex-

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[9]Friedman now asserts that his claim regarding Judge Knapp's comment is not waived because his counsel did in fact "move for a mistrial," albeit "for the record." Even if that tentative request is to be treated as a formal "motion" for a mistrial, the "motion" was withdrawn when counsel asked the court for time "to think about it" and when he later told the court that "any kind of motion is premature."

[10]In this regard, we reject Friedman's request that we vacate Judge Knapp's order prohibiting counsel from interviewing the jurors after the trial. If there was an appropriate time to conduct a second interview of the jury to determine whether they had been exposed to Judge Knapp's comment, that time certainly had expired when the jury began its deliberations.

ample we confronted an analogous situation involving an allegedly prejudicial line of questioning undertaken by a prosecutor. Although the defendant in *Dukes* did object to one of the prosecutor's questions, he neither moved for a mistrial nor sought to have the entire colloquy stricken. We held that "absent . . . a motion [for mistrial], the allegedly prejudicial conduct may be reviewed only for plain error." *Id.; see also United States v. Stirling,* 571 F.2d 708, 734 (2d Cir.), *cert. denied,* 439 U.S. 824 (1978). The fact that the conduct challenged here was that of the trial judge rather than of the prosecution does not diminish the force of this rule. *Cf., e.g., United States v. Carpenter,* 776 F.2d 1291, 1294-95 (5th Cir. 1985) (trial judge's comment that "I still haven't heard [a defense]" reviewed for plain error in absence of objection); *United States v. Salazar,* 293 F.2d 442, 444 (2d Cir. 1961) (trial judge's hostile questioning of defendant reviewed for plain error in absence of objection).

Relying on *United States v. Hammond,* 605 F.2d 862 (5th Cir. 1979), Friedman nevertheless asserts that his claim should not be deemed waived, because Judge Knapp's comment presented him with a "Hobson's choice" between the equally unattractive options of continuing a trial with an arguably tainted jury and of facing the expense and delay of a new trial. Acceptance of this argument, however, would for the most part relieve defendants of the obligations to make mistrial motions, for "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error." *United States v. Scott,* 437 U.S. 82, 93 (1978) (quoting *United States v. Jorn,* 400 U.S. 470, 485 (1971) (Harlan, J.) plurality opinion)). Friedman thus asks for a rule under which a wise defendant would almost always (except in those few cases where reprosecution after a mistrial would be barred) forego a mistrial motion, safe in the knowledge that, after a verdict of guilty, he or she could safely point to the potential expense and delay of a new trial and argue that he or she was now entitled to suffer that expense and delay. We decline to adopt such a rule.

Friedman's reliance on *Hammond*, moreover, is misplaced. In *Hammond*, the government had intimidated the defendant's witnesses. Instead of moving for a mistrial, however, defense counsel agreed to stipulate to the testimony of the intimidated witnesses. On appeal, the Fifth Circuit held that the defendant's due process claim was not waived under the "extraordinary circumstances" presented because "the alternatives posed . . . amounted to a Hobson's choice: either there would be a mistrial, after which a new trial would present the same present trial, or the trial would proceed on the basis of the stipulation." 605 F.2d at 863. In contrast, the instant case involves no such Hobson's choice, for any prejudice that might have resulted from the district court's comment could have been completely cured by a new trial. Accordingly, we review Friedman's claim only for plain error.

There was no reversible error, much less plain error. Judge Knapp's comment was made outside the presence of the jury, and the jury never learned of it. *Cf., e.g., United States v. Giraldo*, 822 F.2d 205, 209 (2d Cir.) (no impact on jury where allegedly biased behavior of court took place outside presence of jury), *cert. denied*, 108 S. Ct. 466 (1987); *United States v. Pisani*, 773 F.2d 397, 403-04 (2d Cir. 1985) (same). Moreover Friedman's claim that there is "no adequate assurance" that the jury was not exposed to the court's remark is directly contradicted by the very record that he urged the district court to make and that led him to drop any request for a mistrial. *See, e.g., United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975) (failure to object to prosecutor's remark not only constitutes waiver but "indicates counsel's own difficulty in finding any prejudice"), cert. denied, 423 U.S. 1059 (1976).

G. *The Effect of the Dismissal of the Mail Fraud Counts*

The government concedes that the mail fraud charges in the instant case must ber dismissed in light of the Supreme Court's decision in *McNally v. United States*, 107 S. Ct. 2875 (1987). We therefore vacate appellants' mail fraud convictions.

In addition, Shafran contends that his RICO conviction must be reversed because of the supposedly inflammatory na-

ture of the now-dismissed mail fraud charges. The indictment charged that the defendants

> unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud the City, the DOT, the PVB[,] [the City Taxi and Limousine Commission, the City Department of General Services] and the citizens of the City of their right to the honest and loyal services of [Donald Manes and Geoffrey Lindenauer, and/or Lester Shafran] and of the right to have the business and affairs of the City, the DOT[,] [and] the PVB[,] [the City Taxi and Limousine Commission and the City Department of General Services] conducted honestly and free from fraud, corruption, and the illegal receipt of bribes.

Indictment ¶¶ 49, 53, 57, 62, 72; *see also id.* ¶ 40. In turn, the jury was asked

> as to each of the mail fraud counts . . . to ascertain whether or not the Government has proven beyond a reasonable doubt that the particular defendant whose case you are considering knowingly and willfully participated in a fraudulent scheme to deprive the City of New York of the honest services of one of its employees through bribery.

Under *McNally*, of course, the "intangible rights" theory does not allege a violation of the mail fraud statute.

We cannot agree that Shafran's RICO convictions must be reversed because of the inflammatory impact of the government's mail fraud theory. As we stated in *United States v. Ivic*, 700 F.2d 51, 65 (2d Cir. 1983), "[i]nvalidation of the convictions under [one] [c]ount . . . does not, of course, lead automatically to reversal of the convictions on the other counts." Rather, we must "consider whether the presence of the [invalidated] count had any spillover effect sufficiently prejudicial to call for reversal." *Id.* We see no prejudice here.

The RICO charges in this case were the core of the indictment, and the core of the RICO charges were state-law bribery allegations. Specifically, the first twenty-nine pages of the forty-one-page indictment were devoted to the two racketeering counts. Of the twenty-five racketeering acts alleged, and the twenty-two that went to the jury, only one, a mail fraud allegation against Friedman involving bribery, did not charge an act of bribery as defined under New York law. The seven mail fraud counts, moreover, paralleled the RICO predicate acts both factually, *see supra* Background Part A, and legally, *see, e.g., United States v. Margiotta*, 688 F.2d 108, 121 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983). Accordingly, "[t]he elimination of the [mail fraud] count[s] would not have significantly altered the trial strategy of the defense," *Ivic*, 700 F.2d at 65, if at all.

Indeed, the likelihood of prejudice in the instant case is even less than that found to be insufficient in *Ivic*, a case in which we reversed the appellants' RICO conspiracy convictions but affirmed as to the remaining counts. In *Ivic*, the predicate acts charged in the RICO conspiracy count, murder and arson, were factually and legally distinct from much of the rest of the "decidedly perjorative connotation," *id.*, that may occur "when the Government . . . tar[s] a defendant with the label of 'racketeer.' " *Id.* (quoting *United States v. Guiliano*, 644 F.2d 85, 89 (2d Cir. 1981)). In contrast, the "intangible rights" theory is hardly "inflammatory." It is fanciful to think that the indictment's boilerplate accusation that Shafran had deprived the City of New York of the "honest and loyal" services of persons such as Lindenauer, Manes and himself could have caused the jury to take leave of reason, particularly in the presence of the numerous valid bribery and racketeering charges. We note in this regard Shafran's acquittal on the mail fraud count concerning the alleged Candler Building bribe. *Cf. id.* (noting jury's "discriminating acquittal on Count 4"). In sum, Shafran suffered no prejudice as a result of the invalid mail fraud counts.[11]

[11] In his reply brief, Friedman presents two arguments as to why reversal of his mail fraud convictions requires reversal of his RICO convictions. The first is similar to Shafran's contention above, but

(Footnote continued on following page)

H. *Preindictment Publicity*

Finally, we address contentions concerning the extensive publicity that surrounded this case during the grand jury investigation. Appellants and amicus contend that much of this publicity, which Judge Knapp described as "outrageous," was instigated by the government. In addressing this issue, we will assume *arguendo* that the government persistently leaked information about grand jury proceedings to the press in an unethical and unlawful campaign both to induce the cooperation of potential witnesses and to supplant state prosecutorial efforts in a bureaucratic turf fight. For reasons stated immediately *infra*, we believe that this claim is precluded by pertinent Supreme Court precedent, no matter how pervasively the rules concerning grand jury secrecy were violated.

Appellants rely in particular upon Fed. R. Crim. P. 6(e)(2), which provides that "an attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules," and upon Rule 7 of the Criminal Rules of the United States District Courts for the

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(Footnote continued.)

emphasizes the fact that "Friedman as the *only* defendant whose alleged participation in an improper mail fraud count was also charged as a predicate act for RICO." We fail to see, however, for reasons stated in the text, how one bribery-related mail fraud predicate act out of the twenty-five charged makes Friedman's contention any more compelling than Shafran's.

Friedman's second argument is that the RICO convictions in this case must be reversed because "[w]ithout the mail fraud counts, this case involved *only* state bribery charges which were leveraged into federal court through the vehicle of RICO." Accordingly, argues Friedman, "under *McNally* there is no valid basis for the exercise of federal jurisdiction." This contention is frivolous. A RICO state-law predicate act is not merely some criminal-law analogue of the pendent state-law civil claim. Rather, racketeering as defined under RICO is itself a federal offense, and RICO's "references to state law serve a definitional purpose, to identify generally the kind of activity made illegal by the federal statute." *United States v. Bagaric*, 706 F.2d 42, 62-63 (2d Cir.) (quoting *United States v. Salinas*, 564 F.2d 688, 690 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978)), *cert. denied*, 464 U.S. 840, 917 (1983).

Southern and Eastern Districts of New York, which provides that

> [w]ith respect to a grand jury or other pending investigation of any criminal matter, a lawyer participating in or associated with the investigation shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication that goes beyond the public record or that is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any dangers or otherwise to aid in the investigation.

Assuming that the government willfully and repeatedly violated these rules, we must nevertheless affirm in light of *United States v. Mechanik*, 475 U.S. 66 (1986). In that case, the Supreme Court rejected a contention that government misconduct during grand jury proceedings required reversal of a defendant's conviction in the absence of any effect on the outcome of his trial. *Mechanik* involved alleged violations of Fed. R. Crim. P. 6(d), and the Court

> assume[d] for the sake of arguement that the simultaneous presence and testimony of . . . two Government witnesses before the grand jury violated Rule 6(d), and that the District Court would have been justified in dismissing portions of the indictment on that basis had there been actual prejudice and the matter been called to its attention before the commencement of the trial.

Id. at 69-70. Nevertheless, the Court held that "the supervening jury verdict made reversal of the conviction and dismissal of the indictment inappropriate." *Id.* at 70. The Court reasoned that the "petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defend-

ants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *Id.* The Court concluded that "[m]easured by the petit jury's verdict . . . any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Id.*

Amicus curiae seeks to distinguish *Mechanik* because of the Court's statement that it "express[ed] no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial." *Id.* at 72. According to amicus, *Mechanik* does not govern her because the government's misconduct was brought to Judge Knapp's attention before trial. This arguement, however, ignores the underlying justification given in *Mechanik*. Specifically, the Court stated:

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. . . . *These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.*

Id. at 72 (emphasis added). Once the district denies, as Judge Knapp did, a motion to dismiss an indictment based on a violation of Rule 6(e), and the trial thereafter takes place, the "balance of interest" is precisely that faced by the Court in *Mechanik*.

Nevertheless, this case stands on a somewhat different footing than *Mechanik*, for the quite simple reason that this case involves a violation of Rule 6(e) as opposed to a violation of Rule 6(d). A betrayal of grand jury secrecy, unlike misconduct or error confined to a grand jury room, jeopardizes the defend-

ant's right to a fair trial before a petit jury. We recognized this distinction recently in *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1045-46 (2d Cir. 1988), where we held that an order denying a motion to dismiss an indictment was not appealable under the collateral-order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). We reached this conclusion because *Mechanik* by its terms does not bar reversal of a conviction when misconduct before the grand jury "has deprived [the] defendant of a fair determination of the issue of guilt or innocence." *Mechanik*, 475 U.S. at 72; *see Midland Asphalt*, 840 F.2d at 1046.

However, appellants simply cannot show resultant prejudice from the publicity surrounding the grand jury proceedings and make no claim that the Connecticut petit jury was affected by the government's misconduct. Rather, they assert only that the "illicit publicity about impermissible facts is likely to be supposed, and could undoubtedly have been shown, to have infected the grand jury." In view of the limited nature of appellants' claim, we have little doubt that the change of venue, and the use of a Hartford jury pool, along with voir dire, removed any possibility of prejudice at trial. Under *Mechanik*, therefore, the government's conduct does not now afford appellants a basis upon which to claim error.

Conclusion

We have examined appellants' other contentions and have found them to be without merit. Accordingly, for the foregoing reasons, we affirm the convictions of Friedman, Lazar and Shafran on the RICO counts, Counts One and Two, along with Kaplan's conviction on Count Seven for perjury. We reserve decision on Kaplan's convictions on Counts One and Two. We vacate the convictions of all appellants on the mail fraud counts, Counts Three, Four, Six, Eight and Nine.

APPENDIX B—Opinion of United States District Court, S.D. New York, Dated May 29, 1986

UNITED STATES of America, Plaintiff,

v.

Stanley FRIEDMAN, Michael Lazar, Lester Shafran, Marvin Kaplan, Marvin Bergman and David Leff, Defendants.

No. SS 86 Cr. 259(WK).

United States District Court,
S.D. New York.

May 29, 1986.

Defendants charged with RICO violations moved for severance and dismissal of indictment. The District Court, Whitman Knapp, J., held that: (1) defendants were properly joined in one indictment; (2) no defendant was entitled to a separate trial as there was no showing that evidence admissible at joint trial would not be admissible in separate trials; (3) showing that two predicate acts were committed with the knowledge that they were part of an ongoing racketeering enterprise and with the intention of furthering its success is sufficient allegation of RICO violations; and (4) pretrial publicity resulting from apparent improper disclosure of grand jury proceed-

ings did not entitle any defendant to severance.

Motions denied.

See also, D.C., 636 F.Supp. 642, 638 F.Supp. 816.

1. Indictment and Information ⇐124(1)

RICO defendants were properly joined in one indictment where it was alleged that, at some point within the relevant time period, each defendant, with realization of the scope of the racketeering activity, knowingly became involved in contributing to the success of that enterprise through a pattern of racketeering activity. Fed.Rules Cr.Proc.Rule 8, 18 U.S.C.A.

2. Criminal Law ⇐622.2(1, 3)

Court should not grant severance of trials in a RICO case unless it concludes that the number of defendants and transactions grouped together in one indictment would render the trial unmanageable, or that some defendants are prejudiced in some manner not contemplated by Congress in adopting the RICO statute, or that some defendants have made a particularized appeal to the court's conscience. 18 U.S.C.A. § 1961 et seq.; Fed.Rules Cr. Proc.Rule 14, 18 U.S.C.A.

3. Criminal Law ⇐622.2(8)

RICO defendants were not entitled to separate trials where none was able to demonstrate that any evidence would be admissible at a joint trial which could not be offered in a separate trial against him. 18 U.S.C.A. § 1961 et seq.; Fed.Rules Cr. Proc.Rule 14, 18 U.S.C.A.

4. Commerce ⇐82.74

RICO requirements of at least two acts and the Supreme Court's requirement of "continuity plus relationship" is satisfied by a showing that two predicate acts were committed with the knowledge that they were part of ongoing racketeering enterprise and with intention of furthering its success. 18 U.S.C.A. § 1961(5).

5. Commerce ⇐82.74

RICO indictment was sufficient which alleged that defendant made two bribe payments to others involved in conspiracy involving New York City Parking Violations Bureau, that defendant knowingly conducted and participated in the affairs of the enterprise through pattern of racketeering, and that he committed perjury under circumstances suggesting knowledge of the existence of the enterprise. 18 U.S.C.A. § 1961(5).

6. Criminal Law ⇐622.2(1)

Change of venue or postponement are the only judicial remedies availabie for excessive publicity and fact that someone in the Department of Justice had apparently improperly disclosed evidence presented to the grand jury did not entitle defendants to severance. Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

Rudolph W. Giuliani, U.S. Atty., S.D.N.Y. by William J. Schwartz and David M. Zornow, Asst. U.S. Attys., for plaintiff.

Thomas P. Puccio, Stroock, Stroock & Lavan, Victor J. Rocco, Botein Hays & Sklar, Larry J. Silverman, Russo Silverman & Vitaliano, Gerald B. Lefcourt, New York City, and Stephen R. Mahler, Mahler & Harris, Kew Gardens, N.Y., for defendants.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

A wide variety of motions have been presented by the several defendants. Most of them have, as a practical matter, been disposed of in the course of oral argument. The following will be dealt with in this opinion: 1) Should any of the defendants (except Leff who has not yet had an oppor-

tunity to be heard) receive separate trials either as a matter of right or discretion? 2) With respect to the defendant Kaplan, is a pattern of racketeering activity sufficiently alleged under the Racketeer Influenced And Corruption Organizations Act (RICO), 18 U.S.C. § 1961 *et seq* (1984)? 3) What, if any, relief can this Court afford the defendants because of the publicity surrounding the Grand Jury investigation?

SEVERANCE

[1] The government alleges that Geoffrey Lindenauer and Donald Manes systematically converted the New York City Parking Violations Bureau into a racketeering enterprise from in or about late 1979 to in or about January 1986. It further alleges that at some point within that time period each defendant, with realization of its scope, knowingly became involved in contributing to the success of that enterprise through a pattern of racketeering activity. If the government can prove this as to each defendant, each would be properly convicted of a violation of RICO. It follows that they are properly joined in one indictment under Fed.R.Crim.P. 8. No defendant therefore is entitled to a severance as a matter of law.

[2] In considering the question of prejudicial joinder under Fed.R.Crim.P. 14, we cannot be governed by our personal belief that the RICO statute is an unwise and unfair piece of legislation. Therefore we can, without concluding that defendants are entitled to separate trials, accept their argument that some of them would be subject to "spillover" in the sense of having to be tried in a case involving fraudulent activities much more extensive than anything in which they specifically agreed to participate. It was precisely because the Congress was concerned with the seriousness of "racketeering activity" that it wished to make it easier for the government to convict those even peripherally engaged therein, provided that they themselves were aware of the broader scope of the activity involved. Consequently it seems to us that a court should not grant a severance in a RICO case unless it concludes: 1) as did Judge Duffy in *United States v. Castellano* (S.D.N.Y.Sept.1985) 84 Cr. 63 (KTD), that the number of defendants and transactions grouped together in one indictment would render the trial unmanageable; or 2) that some defendant or defendants were "prejudiced" in some manner not contemplated by the Congress; or 3) that some defendant or defendants have successfully

made some other particularized appeal to the court's conscience. None of these considerations apply to the defendants now before us.

[3] With respect to spillover, no defendant has been able to demonstrate that any evidence would be admissible at a joint trial which the government could not, if it wished, offer in a separate trial against him. In that respect this case is clearly distinguishable from *United States v. Figueroa* (2d Cir.1980) 618 F.2d 934, 946, upon which defendants rely in making the spillover argument. In *Figueroa* the Court of Appeals held that the erroneous admission of evidence of prior criminal acts by a co-defendant unfairly prejudiced the other defendants as well. Since evidence of another person's criminal record, unlike the enterprise proof in a RICO case, would never be admissible against a defendant being tried alone, *Figueroa* is inapposite to the case at bar.

PATTERN OF RACKETEERING ACTIVITY

Defendant Kaplan argues that the allegations against him fail to allege a "pattern" of racketeering activity because, at most, he is charged with arranging to pay two bribes in order to get a contract for his

company. Relying on a footnote in *Sedima S.P.R.L. v. Imrex Co., Inc.*, (1985) — U.S. ——, 105 S.Ct. 3275, 3283 n. 14, 87 L.Ed.2d 346, and subsequent opinions in the civil context interpreting the pattern requirement in light of that footnote, *see Superior Oil Co. v. Fulmer* (8th Cir.1986) 785 F.2d 252; *Soper v. Simmons* (S.D.N.Y. 1986) (Sand, J.) 632 F.Supp. 244 (and cases cited therein); *Northern Trust Bank/O'Hara, N.A. v. Inryco, Inc.* (N.D. Ill.1985) 615 F.Supp. 828, Kaplan urges that since the government has not alleged that he committed a pattern, he is entitled to dismissal of the indictment. We disagree.

A pattern of racketeering activity is defined by the RICO statute as requiring "at least two acts of racketeering activity ... within ten years." 18 U.S.C. § 1961(5). The oft-cited *Sedima* footnote first observes that

> the definition of "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity." § 1961(5) (emphasis added by Supreme Court), not that it "means" two such acts. The implication is that while two acts are necessary they may not be sufficient.

It then quotes with approval from Senate and House Reports regarding the bill.

> "The target of RICO is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern ..." Significantly, in defining "pattern" in the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events:"

105 S.Ct. at 3285 n. 14.

Thus it has become clear that something more than merely two prior acts is required. The question remains how much more.

The cases cited by defendants all arose in the civil context. None involved a pre-existing racketeering enterprise that the defendant is alleged to have joined with knowledge of its scope. None presented the question of whether an individual who commits the requisite two predicate acts

and involves himself in the affairs of the enterprise in other ways not charged as RICO predicate acts can properly be charged with a pattern of racketeering activity.

[4] Although there is no case settling these questions one way or the other, we believe that the statute's requirement of "at least" two acts, combined with the Supreme Court's requirement of "continuity plus relationship" is satisfied by a showing that the two predicate acts were committed with the knowledge that they were part of an ongoing racketeering enterprise and with the intention of furthering its success.

[5] In this case the indictment alleges that Kaplan "knowingly" conducted and participated in the affairs of the enterprise through a pattern of racketeering activity. It also alleges that he committed perjury under circumstances which, on their face, suggest knowledge of the existence of the enterprise and the intent to further its success. The government also advises us that it will show at trial that Kaplan took further steps to facilitate the functioning of this racketeering enterprise in his alleged participation in a scheme to help Friedman launder money obtained in connection with Operation Scofflock. We therefore deny Kaplan's motion to strike the RICO count.

However, as the "pattern" question is clearly not free from doubt,[1] it would be appropriate to observe that the question may again be raised in connection with a Rule 29 motion.

PUBLICITY

Counsel for defendant Lazar, acting in this instance on behalf of all defendants, has amassed a considerable body of evidence suggesting that one or more employees of the Department of Justice have violated Fed.R.Crim.P. 6(e) by disclosing evidence that was presented to the Grand Jury. Indeed, unless the media was wholly irresponsible in continually asserting that the source of these revelations was someone in the Department of Justice who was asking not to be identified, it may well be said that such improper disclosure has been established by the sheer number of newspaper articles citing such an authority in providing information that turned out to be

1. It might seem reasonable for a defendant to argue that the inability of the Supreme Court, or any other court, to specify exactly what conduct RICO criminalizes renders the statute unconstitutional. However, we recognize that a plethora of Supreme Court and Court of Appeals decisions have indicated directly or by implication that, notwithstanding its incomprehensibility, the statute is nonetheless constitutional.

accurate. However, the question remains whether or not this Court is in a position to take effective action to remedy the situation.

It may well be that the Attorney General of the United States would be interested in ascertaining which of his employees was engaged in violating one of the statutes he or she was sworn to uphold, or the Congress might deem such an inquiry appropriate. However, we fail to see how we can take effective action in light of our primary obligation to provide a fair trial to the defendants before us. Any inquiry we might conduct to try to determine responsibility for the unauthorized leaks could only unleash a flood of publicity which would dwarf anything heretofore experienced, and would certainly do nothing to relax the pressures under which the trial would proceed.

[6] Moreover, the defendants have not suggested any relief to which they would be entitled should we succeed in fastening responsibility on any person or persons. They concede that there is no authority suggesting that dismissal of an otherwise valid indictment would be appropriate. Defendant Friedman made a suggestion which at first appealed to us, namely that

the case against him be severed. Upon reflection we realize that it would not alleviate, and might exacerbate, the problems of which defendants complain. Such a severance and the ensuing successive trials would generate additional publicity which would probably harm not only the defendant who had been severed, but all the other defendants as well. We believe the government is correct in its assertion that a change of venue or postponement are the only judicial remedies available for excessive publicity. Both of those remedies have been specifically rejected by the defendants.[2]

CONCLUSION

In summary, we deny all defendants' motions for severance, Kaplan's motion to strike the RICO count, and Lazar's application to conduct a hearing with respect to Grand Jury publicity. The trial shall commence on June 16, 1986.

SO ORDERED.

APPENDIX C—Opinion of United States District Court, S.D. New York, Dated June 19, 1986

UNITED STATES of America, Plaintiff,

v.

Stanley FRIEDMAN, Michael Lazar, Lester Shafran, Marvin Kaplan, Marvin Bergman and David Leff, Defendants.

SS 86 Cr. 259(WK).

United States District Court,
S.D. New York.

June 19, 1986.

Defendant in criminal prosecution subpoenaed from two doctors psychiatric records of anticipated witness against him in upcoming trial. Witness moved to quash subpoenas. The District Court, Whitman Knapp, J., held that records containing intensely personal communications were protected under psychotherapist-patient privilege.

Motion granted in part.

See also D.C., 635 F.Supp. 782; D.C., 638 F.Supp. 816.

Criminal Law ⇐627.5(6)

Psychiatric records containing intensely personal communications, in form of per-

sonal statements made by patient, recollections of past experiences, notes of dreams, and observations of patient by doctor, were protected under psychotherapist-patient privilege, and were not subject to discovery by defendant against whom patient was anticipated to testify in criminal action.

Thomas P. Puccio, Stroock & Stroock & Lavan, New York City, for defendant Friedman.

Irving P. Seidman, New York City, for Geoffrey Lindenauer.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

Defendant Stanley Friedman has subpoenaed from two doctors the psychiatric records of Geoffrey Lindenauer, an anticipated witness against Friedman in his upcoming trial. Lindenauer has moved to quash the subpoenas, claiming protection under the psychotherapist-patient privilege. We have received the records in question from one of the doctors for an *in camera* inspection. We now substantially grant Lindenauer's motion to quash as to those records.

From the records we received from the psychiatrist, (handwritten notes of psychiatric sessions from 1970–1984, the vast majority of which pertain to the period prior to that which contains the acts alleged in this indictment, and a letter of recommendation from the psychiatrist to a third party in no way involved in this proceeding), we observe at the outset that none of this material is relevant to this case and, in the exercise of our discretion, we would not permit its use at trial regardless of any claim of privilege. Nonetheless, the proper standard on a motion of this sort is not admissibility but discoverability, and we must determine whether the witness Lindenauer is entitled to any form of protection for these documents.

The question of whether a witness is entitled to protection for psychiatric records and, if so, the extent of such protection, remains unsettled. It has been presented to the courts in terms of both privilege and privacy rights. *See, e.g., In Re Doe* (2d Cir.1983) 711 F.2d 1187; *United States v. Lindstrom* (11th Cir.1983) 698 F.2d 1154; *In Re Zuniga* (6th Cir.1983) 714 F.2d 632. Courts have generally considered the matter on the facts of the particular case involved, often after *in camera* inspection of the records in question,

and weighed the interest in disclosure of the particular material there at issue against the witness-patient's interest in the confidentiality of that information. As the Court of Appeals noted in *In Re Doe* (2d Cir.1983) 711 F.2d 1187, 1193, the four conditions advanced by Professor Wigmore as necessary to the establishment of a privilege could obtain in a true psychotherapist-patient relationship. These four conditions are: 1) the communication must be one made in the belief that it will not be disclosed; 2) confidentiality must be essential to the maintenance of the relationship between the parties; 3) the relationship should be one that society considers worthy of being fostered; and 4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation. 8 J. Wigmore *Evidence* § 2285, at 572 (McNaughton rev. 1961).

In *Doe*, a case involving a Grand Jury investigation into an alleged sham medical clinic, the Court of Appeals refused to recognize the presence of any such privilege. The court's analysis focussed on the balancing required by the fourth of Wigmore's conditions and noted that the *in camera* inspection undertaken by the court below revealed that

> there are no communications in these files of the intensely personal nature that the psychotherapist-patient privilege is designed to protect from public scrutiny. There is also no need to redact the names of supposed patients before surrender of the files because there is substantial evidence indicating that no real psychotherapist-patient relationship existed between Doe and the persons whose identities appear in the files.

711 F.2d at 1193. *Accord In Re Zuniga supra.* (Finding the existence of a psychotherapist-patient privilege but holding that the balance there tipped against its application); *United States v. Witt* (S.D.N.Y.1982) (Haight J.) 542 F.Supp. 696 (no psychotherapist-patient privilege can be asserted by a physician who was not a psychiatrist or psychologist, in order to shield records from Grand Jury investigating alleged "scrip mill" used to evade taxes and distribute controlled substances); *see United States v. Lindstrom, supra* at 1166 (after an *in camera* inspection revealed that "the key witness was suffering from an ongoing mental illness which caused her to misperceive and misinterpret the words and actions of others, and which might seriously affect her ability to know, comprehend and relate the truth" it was reversible error for

the District Court to deny defendants access to these psychiatric materials.)

Unlike *In Re Doe* or any of the other above cited cases, the material here subpoenaed contains the type of intensely personal communications that the psychotherapist-patient privilege is designed to protect. The notes contain extremely personal statements made by the patient, recollections of past experiences, notes of dreams, as well as observations of the patient by the doctor. It is clear that a real, lasting and professional psychotherapist-patient relationship existed between Lindenauer and his doctor. Further, unlike *Lindstrom, supra*, nothing in our inspection of these materials suggests to us any impediment to Lindenauer's ability to know, comprehend and relate the truth.

We must conclude that all four conditions expressed by Professor Wigmore and weighed by the Court of Appeals in *In Re Doe, supra*, have been satisfied by the facts of the case at bar. Accordingly, the motion to quash is granted with respect to all of the doctor's material except the letter of recommendation which, although irrelevant, is not privileged.

SO ORDERED.

APPENDIX D—Opinion of United States District Court, S.D. New York, Dated June 23, 1986

UNITED STATES of America, Plaintiff,

v.

Stanley FRIEDMAN, Michael Lazar, Lester Shafran, Marvin Kaplan, Marvin Bergman and David Leff, Defendants.

No. SS 86 Cr. 259(WK).

United States District Court,
S.D. New York.

June 23, 1986.

On Reconsideration Aug. 1, 1986.

On witness' motion on Fifth Amendment grounds to quash subpoena issued on behalf of defendant, the District Court, Whitman Knapp, J., held that witness was required to produce documents to extent that he had already revealed information contained in them to Government.

Ordered accordingly.

See also 636 F.Supp. 462.

Witnesses ⇐305(1)

Witness who claimed that production of documents pursuant to defendant's subpoena would violate his right against self-

incrimination was required to produce the documents to extent that he had already revealed information contained in them to Government. U.S.C.A. Const.Amend. 5.

Irving P. Seidman, New York City, for movant Geoffrey Lindenauer.

Larry J. Silverman, Russo, Silverman & Vitaliano, New York City, for defendant Lester Shafran.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

Geoffrey Lindenauer moves on fifth amendment grounds to quash a subpoena issued on behalf of defendant Lester Shafran calling for a wide variety of papers claimed to be in Lindenauer's possession, including cancelled checks, bank statements, credit card receipts, car leasing receipts, Blue Cross and Blue Shield receipts, records of medical expenses, individual tax returns, telephone logs, and business calendars and diaries. The disposition of this motion is controlled by *United States v. Doe* (1984) 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552; *see also In Re Grand Jury Subpoena Duces Tecum* (2d Cir.1983) 722 F.2d 981. For reasons that follow we be-

lieve *Doe* requires that the motion be granted.[1]

In *Doe* Justice Powell delivered the opinion of the Court in which 5 Justices joined. Justices Marshall, Brennan and Stevens—concurring in part and dissenting in part-challenged one of the two propositions set forth in the opinion, but concurred in the other. It is the portion of the opinion as to which the Court was unanimous that here controls. In the unchallenged portion of that opinion, the Court re-affirmed the long-standing doctrine that an individual may not be compelled to produce documents in his possession if the act of production would involve self-incrimination. In a footnote illustrating this holding, the Court observed, 465 U.S. at 614 n. 13, 104 S.Ct. at 1243 n. 13,

1. This case is unusual in that a defendant rather than the prosecution is seeking to overcome a person's fifth amendment rights. However, we see no reason why the same rules should not apply. We noted on oral argument that the government's ability to give its own witnesses immunity, while the defense has no such privilege, seems to give the government an advantage. However, the rule requiring this result—which rule the defendant does not challenge—is rooted in clearly established considerations of public policy.

Respondent did not concede in the District Court that the records listed in the subpoena actually existed or were in his possession. Respondent argued that by producing the records, he would tacitly admit their existence and his possession. Respondent also pointed out that if the Government obtained the documents from another source, it would be admissible at trial. *See* Fed.R.Evid. 901. By producing the documents, Respondent would relieve the Government of the need for authentication. *These allegations were sufficient to establish a valid claim of the privilege against self-incrimination.* (emphasis supplied)

We think that the quoted observation is here controlling. Lindenauer has entered into a cooperation agreement which protects him from prosecution by the United States Attorney for the Southern District of New York, the United States Attorney for the Northern District of Illinois and various New York State Agencies. He has advised us—and neither the United States Attorney nor defendant Shafran disputes this—that in addition to the crimes for which he might be subject to prosecution by those offices, it would be possible for the Government, acting through other agencies, to prosecute him for other

crimes. Although no one suggests that there exists any present intention to prosecute him for such additional crimes, there is no legal obstacle to such prosecution should the Department of Justice at some future time decide to initiate one. It is clear that if Lindenauer were required to produce the documents pursuant to the instant subpoena, the Government would, in any future prosecution be relieved of "the need for authentication." It follows that the subpoena must be quashed.[2]

SO ORDERED.

ON RECONSIDERATION

By Memorandum & Order dated June 23, 1986 we granted Geoffrey Lindenauer's motion to quash a subpoena for the production of documents which had been served on him by the defendant Lester Shafran. On July 3 we granted Shafran's motion to reconsider. The informative argument on reconsideration has greatly contributed to a clarification of the issues involved.

2. Lindenauer's cooperation agreement also promises him use immunity for documents produced before the Grand Jury or at trial. There is no promise of protection for documents produced pursuant to a subpoena but not introduced at trial.

The demand for documents in Lindenauer's possession brings into focus the tension between *Fisher v. United States* (1976) 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 and *United States v. Doe* (1984) 465 U.S. 605, 104 S.Ct. 1237, 79 L.Ed.2d 552. *Fisher* established that even personal documents in the hands of an individual are not protected by the fifth amendment just because the content of such documents would be incriminating. *Doe* modified that holding by ruling that if production of the documents would constitute a tacit admission of the existence of the documents and the subpoenaed person's possession thereof, or if the subpoenaed person's very production of the documents could at some future time relieve the Government of the need for authenticating them, their production would be prohibited by the amendment.

Shafran argues that the *Doe* case is inapplicable for two reasons: first, it could not possibly be relevant in any future prosecution of Lindenauer whether or not he possessed the documents; and second, since all of the subpoenaed documents are self-authenticating, his delivery of them could not in any way assist the Government in any future litigation. Lindenauer on the other

hand asserts that the mere production of the documents, while it could not assist the Government in either of the ways specified by *Doe*, might nonetheless be highly incriminating by revealing the existence of such things as bank accounts of which the Government might not be aware and which might contain highly incriminating information. We think Lindenauer's reading of the *Doe* case to be correct, but we find it here inapplicable.

The linchpin of Lindenauer's argument is that delivery of the documents to Shafran (or to anyone else) might either reveal evidence of wrongdoing which is now unknown to the Government or a lead to such evidence. However, if in fact Lindenauer has already revealed such evidence (or such leads) to the Government, delivery of the documents to Shafran could do him no harm whatever. We shall accordingly modify the subpoena and restrict it to documents the production of which, under the foregoing analysis, could not harm Lindenauer. Thus, with respect to bank records we shall restrict it to such records respecting bank accounts of which Lindenauer has already informed the Government. With respect to telephone records we shall restrict it to such records for telephone numbers of which Lindenauer has already made

the Government aware, and similar restrictions will apply to all other documents requested (except, of course, the retained copies of income tax returns which we believe to be wholly unprotected by the fifth amendment, and the credit card information with respect to accounts specifically identified in the subpoena).[1]

There is no need for any hearing to determine what documents would be covered by the subpoena as so modified. Lindenauer knows what information he has heretofore given to the Government. If, in the light of that knowledge, he fails to honor the subpoena and such knowledge is subsequently made manifest (as it undoubtedly must be in the course of continuing litiga-

1. At oral argument there was much discussion as to whether or not the fifth amendment had been waived. In our view this was a wholly irrelevant discussion. The fifth amendment, as explained by *Doe*, protects a person from being compelled—either through testimony or testimonial act—to provide anyone with information (except what might be contained in the unprivileged document itself) which, if it came to the Government's attention, could increase the provider's possibility of being prosecuted for crime. As we have structured the subpoena, Lindenauer will provide no such information that is not already known to the Government. It follows that the fifth amendment is in no way implicated, and need not have been "waived."

tion) he will be subject to substantial penalties for civil and criminal contempt of court.

With respect to the telephone and medical records, we make special exceptions. As to the former, while it seems obvious that many of those records would reflect business calls which might be highly relevant to the instant lawsuit, it seems equally obvious that many such calls would be of a highly personal nature, either by Lindenauer or other members of his household, which would be wholly irrelevant and the disclosure of which would simply amount to an unjustified invasion of privacy. Such records shall accordingly be turned over to defense counsel pursuant to a stipulated protective order, to be agreed upon by counsel, providing that any of them found to be irrelevant to the issues of this trial shall remain confidential.

With respect to the medical records, we excise that demand from the subpoena. Defense efforts to discover Lindenauer's medical and psychological records thus far have been extensive and amply-litigated, and yielded nothing that we consider relevant to this lawsuit. Since it appears to us that these further general requests for "any and all medical records" constitute an impermissibly broad fishing expedition into

highly personal and private matters unlikely to yield relevant evidence, we decline to order their production.

SO ORDERED.

APPENDIX E—Constitution and Statutory Provisions.

Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * and to have the Assistance of the Counsel for his defense."

Constitution, Article 3, Section 2, Clause 3

"The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may be Law have directed."

Title 18 USC, Section 1961, Subdivision 5

"pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;"

Title 18 USC, Section 1962, Subdivision (c)

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

Title 18, Section 1962, Subdivision (d)

"It shall be unlawful for any person to conspire to violate any of the provisions of subsections 1 (a), (b) or (c) of this section."

Title 28, Section 1254, Subdivision 1

"Cases in the Court of Appeals may be reviewed by the Supreme Court '* * * by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;' "

Federal Rule of Criminal Procedure 6(d)

"Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

Federal Rule of Criminal Procedure 6(e)(2)

"General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules."

Federal Rule of Criminal Procedure 18

"Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."

Federal Rule of Evidence, 806

"When a hearsay statement, or a statement defined in Rule 801(d)(2), (c), (d), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness."

Rule 7 of the Southern and Eastern District Rules

"A lawyer '* * * shall refrain from making any extrajudicial statement which a reasonable person would expect to be disseminated by means of public communication that goes beyond the public record or is not necessary to inform the public that the investigation is underway, to describe the general scope of the investigation, to obtain assistance in the apprehension of a suspect, to warn the public of any damages or otherwise to aid in the investigation.' "

28 CFR, Section 50.2 (d)(2)

"At no time shall personnel of the Department of Justice furnish any statements or information for the purpose of influencing the outcome of a Defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to influence the outcome of a pending or future trial."

Nos. 88-250 and 88-278

Supreme Court, U.S.
FILED
OCT 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL LAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

STANLEY FRIEDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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28 pp

QUESTIONS PRESENTED

1. Whether petitioners were entitled to reversal of their convictions on appeal based on preindictment publicity that allegedly affected the grand jury's charging decision.

2. Whether petitioner Lazar was properly convicted of the single RICO conspiracy charged in the indictment.

3. Whether petitioner Friedman's Sixth Amendment right to confront the witnesses against him was abridged by the district court's evidentiary rulings or by his counsel's alleged conflicts of interest.

4. Whether petitioner Friedman's RICO convictions must be reversed because one of the five predicate acts on which the conviction was based alleged a theory of mail fraud invalidated by this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987).

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-250

MICHAEL LAZAR, PETITIONER

v.

UNITED STATES OF AMERICA

No. 88-278

STANLEY FRIEDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-104a)[1] is reported at 854 F.2d 535. The rulings of the district court (Pet. App. 1b-7b; 88-278 Pet.

[1] "Pet. App." refers to the appendix to the petition filed by petitioner Lazar in No. 88-250. "88-278 Pet. App." refers to the appendix to the petition filed by petitioner Friedman in No. 88-278.

App. 1c-6c, 1d-10d) on various pretrial motions are reported at 635 F. Supp. 782, 636 F. Supp. 462, and 638 F. Supp. 816.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1988. The petition for a writ of certiorari in No. 88-250 was filed on August 10, 1988. The petition for a writ of certiorari in No. 88-278 was filed on August 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conducting and participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and conspiring to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Each of the petitioners was also convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341.

Petitioner Friedman was sentenced to a term of 12 years' imprisonment to be followed by five years' probation. He was also ordered to forfeit certain securities. Petitioner Lazar was sentenced to three years' imprisonment and a $200,000 fine and was ordered to forfeit $45,000. The court of appeals vacated petitioners' mail fraud convictions based on this Court's intervening decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), but affirmed their convictions on the racketeering counts (Pet. App. 1a-104a).

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 5a-31a).

It showed that petitioners participated in a conspiracy whose object was to transform the New York City Parking Violations Bureau ("PVB") from a public agency devoted to the performance of public services for the citizens of New York into a vehicle for the corrupt profit of county party leaders, public officials, private businesses, and private businessmen. From late 1979 until the end of 1985, through an extended pattern of bribery, petitioners and their co-defendants enriched themselves by buying and selling PVB contracts and corruptly influencing decisions made by City officials associated with the PVB.

2. The rulings that are the subject of the petitions and their background are as follows:

a. Both petitioners filed pretrial motions claiming that the government had leaked information concerning grand jury proceedings to the press in violation of Fed. R. Crim. P. 6(e) and requesting a hearing on these allegations. The district court acknowledged that there had been massive publicity surrounding the case, as well as frequent attributions by the press to unidentified Department of Justice sources. However, noting the petitioners' concession that "there is no authority suggesting that dismissal of an otherwise valid indictment would be appropriate" because of disclosure of information during the preindictment stage (Pet. App. 7b), the court concluded that "[a]ny inquiry we might conduct to try to determine responsibility for the unauthorized leaks could only unleash a flood of publicity which would dwarf anything heretofore experienced, and would certainly do nothing to relax the pressures under which the trial would proceed" (*id.* at 6b).[2]

---

[2] Steps were taken to assure that the defendants would not be prejudiced at trial by publicity. On the defendants' mo-

On appeal, petitioners did not contend that they had been prejudiced at trial by the preindictment publicity. Instead, they renewed their argument that the indictment should have been dismissed because of that publicity. The court of appeals "assume[d] *arguendo* that the government persistently leaked information about grand jury proceedings to the press in an unethical and unlawful campaign both to induce the cooperation of potential witnesses and to supplant state prosecutorial efforts in a bureaucratic turf fight" (Pet. App. 101a). Nevertheless, relying on this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986), the court of appeals held that given the petit jury's guilty verdict, " 'any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt' " (Pet. App. 102a (quoting *Mechanik*, 475 U.S. at 70)). That was because, as the court of appeals explained, the " 'petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt' " (Pet. App. 102a (quoting *Mechanik*, 475 U.S. at 70)).[3]

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tion, with the government's consent, the district court transferred the trial to the District of Connecticut at New Haven. The jury was drawn from the District of Connecticut's Hartford jury pool, outside the New York metropolitan area, and extensive voir dire was conducted on possible exposure to pretrial publicity. Pet. App. 6a.

[3] It was immaterial, the court of appeals found, that the misconduct in *Mechanik* had not been brought to the attention of the trial court before the commencement of trial. The court held that where, as here, the district court has proceeded with trial and the court of appeals is reviewing a conviction, the rationale underlying *Mechanik* is fully applicable. Pet. App. 102a-103a.

The court recognized that "*Mechanik* by its terms does not bar reversal of a conviction when misconduct before the grand jury 'has deprived [the] defendant of a fair determination of the issue of guilt or innocence' " (Pet. App. 103a-104a (citation omitted)). But it concluded that petitioners "simply cannot show resultant prejudice from the publicity surrounding the grand jury proceedings and make no claim that the Connecticut petit jury was affected by the government's misconduct" (Pet. App. 104a). Under *Mechanik*, the court held, "the government's conduct does not now afford [petitioners] a basis upon which to claim error" (Pet. App. 104a).

b. The indictment alleged a single RICO conspiracy to conduct the affairs of the PVB through a pattern of racketeering activity. Petitioners moved before trial, in the alternative, for dismissal because of misjoinder (Fed. R. Crim. P. 8(b)) or for a severance (Fed. R. Crim. P. 14). The district court denied the motions. It observed that the essence of the allegations in the indictment was that the PVB had been converted into a racketeering enterprise, and that at some point each defendant knowingly became involved in contributing to the success of that enterprise through a pattern of racketeering activity. "If the government can prove this as to each defendant," the district court concluded, "each would be properly convicted of a violation of RICO. It follows that they are properly joined in one indictment under Fed. R. Crim. P. 8" (Pet. App. 2b-3b). The district court also rejected petitioners' contentions that they would be prejudiced by "spillover" evidence of corrupt acts by other defendants in which they did not participate. Pet. App. 3b-4b.

At the close of the government's case, Lazar moved for a severance based upon an alleged variance be-

tween the indictment and the proof regarding the existence of a single conspiracy. The district court denied the motion. The court instructed the jury that it could not convict a defendant unless the government had proved the defendant knowingly and willfully participated in the particular conspiracy alleged in the indictment, and that it "would be wholly immaterial that the Government might prove that the defendant was involved in other or different conspiracies." Pet. App. 53a n.5. Neither petitioner objected to that instruction at trial (Pet. App. 53a).

The court of appeals rejected Lazar's claims that he should not have been indicted and tried as a participant in a single RICO conspiracy with the other defendants, and that the evidence was insufficient to sustain his conviction on that theory. With respect to the indictment, the court held that "the indictment properly alleged Lazar's membership in an overall conspiracy to operate the PVB as a racketeering enterprise" (Pet. App. 52a).

Similarly, the court of appeals rejected Lazar's contention, advanced for the first time after the trial, that the jury instruction on the conspiracy count was inadequate (Pet. App. 53a), and the court had "no difficulty in concluding that the evidence supported the jury's finding of a single RICO conspiracy" (Pet. App. 55a). The court explained that "[so] long as the alleged RICO co-conspirators have agreed to participate in the affairs of the same enterprise, the mere fact that they do not conspire directly with each other 'does not convert the single agreement to conduct the affairs of an enterprise through a pattern of racketeering activity into multiple conspiracies'" (Pet. App. 55a (citation omitted)). It went on to find that the jury could have concluded "that Lazar knew that he was not simply partici-

pating in isolated bribery conspiracies but rather in the broader conspiracy charged in the indictment, a conspiracy to operate the PVB for private gain through a pattern of racketeering activity." Pet. App. 55a.

c. Before trial, Friedman served subpoenas on two physicians, seeking the psychiatric records of Geoffrey Lindenauer, a former Deputy Director of the PVB who was a major government witness. Lindenauer moved to quash the subpoenas. After reviewing one doctor's records in camera, the district court granted the motion, holding that the documents were subject to the psychotherapist-patient privilege. 88-278 Pet. App. 2c-6c. The court of appeals affirmed (Pet. App. 73a-75a). After conducting its own in camera review, the court agreed that a true psychotherapist-patient relationship existed and that nothing in the records cast any doubt upon Lindenauer's ability to understand and relate the truth (*ibid.*). In any event, the court held, any error there might have been in quashing the subpoena was harmless beyond a reasonable doubt. "The notes contain little, if any, material that would have been useful in cross-examining Lindenauer," the court found, and "they could not have had even a marginal impact upon the jury's assessment of Lindenauer's credibility" (*id.* at 74a).

The district court also excluded evidence that former Queens Borough President Donald Manes had lied to law-enforcement authorities about his January 1986 suicide attempt. Friedman claimed that this evidence was admissible under Fed. R. Evid. 806 to impeach the credibility of out-of-court declarations by Manes to which Lindenauer had testified. The court of appeals upheld the district court's ruling, finding that "[t]he evidence of Manes' false * * * story had

no conceivable bearing upon the credibility of his statements to Lindenauer in furtherance of the conspiracy" and noting that other evidence bearing on Manes' credibility was admitted. Pet. App. 68a-73a.

Friedman also argued to the court of appeals that his trial counsel, Thomas P. Puccio, "sidestepped crucial lines of cross-examination" because of conflicts of interest resulting from Puccio's representation of Robert Richards, an indicted conspirator, and Melvin Lebetkin, an unindicted conspirator, and Puccio's participation in a conversation recorded by a Jerome Driesen, an informant who later became a government witness. After reviewing the details of those contentions at length, the court held that Friedman waived the first alleged conflict and that the other two alleged conflicts were not conflicts at all. Pet. App. 75a-89a.

The alleged conflicts arising from Puccio's prior representation of Richards and Lebetkin were first the subject of a pretrial motion by the government to disqualify Puccio. Friedman vigorously opposed that motion. He and Puccio submitted affidavits in which they denied the existence of any conflict, asserted that Friedman would suffer irreparable injury if Puccio were disqualified, reported that Friedman had consulted independent counsel who concurred that there was no conflict, and expressly waived "the benefit of any purported conflict." See Pet. App. 76a-80a. Under these circumstances, and in light of the fact that Friedman had previously served as an Assistant District Attorney, the court of appeals concluded that Friedman's express waiver was "knowing and intelligent" (Pet. App. 81a).

The court also held that Puccio's defense of Friedman had not been compromised by his prior representation of Lebetkin. After finding that Puccio's

cross-examination of two witnesses had not been limited in any meaningful way by the prior representation, the court held that Friedman had failed to show either "an 'actual conflict of interest,' *Cuyler* v. *Sullivan*, 446 U.S. 335, 349 (1980), or a 'lapse in representation,' " *United States* v. *Iorizzo*, 786 F.2d 52, 58 (2d Cir. 1986). Pet. App. 82a.

Friedman's final claim of conflict arose out of "a curious incident" in which a government witness and informant, Jerome Driesen, surreptitiously tape-recorded a meeting at which attorney Harold Borg and Puccio were present. In a post-trial motion and on appeal, Friedman contended that Puccio may have been representing Borg at the time and had limited his cross-examination of Driesen at trial because of that representation. After reviewing the facts at length, the court of appeals concluded that "the Driesen tape would have been of no use to Friedman's defense, and * * * there was thus neither an actual conflict of interest nor a lapse in Puccio's representation of Friedman." Pet. App. 89a.

d. On appeal, the government conceded that this Court's decision in *McNally* v. *United States*, No. 86-234 (June 24, 1987), required that petitioners' mail fraud convictions be vacated. In a reply brief, petitioner Friedman argued that reversal of his RICO convictions was also required. The court of appeals rejected that contention, finding that Friedman had not been prejudiced by the submission of that theory to the jury. Pet. App. 100a n.11.

ARGUMENT

1. Petitioner Lazar contends (88-250 Pet. 13-18) that the court of appeals' disposition of his preindictment publicity claim conflicts with this Court's decisions in *United States* v. *Mechanik*, 475 U.S. 66 (1986), and *Bank of Nova Scotia* v. *United States*, No. 87-578 (June 22, 1988). Petitioner Friedman offers a variation on that theme, asserting (88-278 Pet. 7-12) that the government's alleged violations of Fed. R. Crim. P. 6(e) forced him to seek a change of venue and thus effectively denied him his right to be tried in the judicial district where the crime was committed. See U.S. Const. Art. III, § 2, Cl. 3; Amend. VI. Neither, however, raises any claim regarding the effect of publicity on the trial itself, nor does either dispute that he received a full and fair adjudication of his case based on the facts proved at trial and nothing else. Under these circumstances, petitioners' claims warrant no further review by this Court.[4]

There is no conflict of any kind between the court of appeals' ruling and *Mechanik*. In *Mechanik*, this Court held that notwithstanding a violation of Fed. R. Crim. P. 6(d)—the simultaneous presence and testimony of two government witnesses before the grand jury—"the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation" (475 U.S.

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[4] The court of appeals assumed arguendo that the government violated Fed. R. Crim. P. 6(e) and leaked confidential information concerning the grand jury to the media. The United States Attorney's office has, however, consistently denied responsibility for any violations of Rule 6(e). See, *e.g.*, Gov't C.A. Br. 113-118.

at 73). The Court explained that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt" (*id.* at 70). As the court of appeals recognized, all of the considerations that this Court found persuasive in *Mechanik* apply to this case. Here, as in *Mechanik*, the defendants' convictions have confirmed the existence of probable cause to indict. Reversal of the convictions at this stage will not "restore [these petitioners] to the position in which [they] would have been had the indictment been dismissed before trial." *Id.* at 71. And the "substantial social costs" that weigh against reversal "when an error has had no effect on the outcome of the trial" (*id.* at 72) are just as compelling here as in *Mechanik*.

Mechanik reserved the question of what remedies might be appropriate if allegations of a violation of Rule 6 are brought to a district court's attention before the commencement of trial. 475 U.S. at 72. The application of the principles of *Mechanik* to that situation, however, presents no substantial issue calling for this Court's review. A number of courts of appeals have applied *Mechanik* to cases in which pretrial motions, based on a wide variety of alleged defects in grand jury proceedings, were made.[5] As

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[5] *See United States* v. *Hefner*, 842 F.2d 731 (4th Cir. 1988) (claim that grand jury foreman was ineligible to serve); *United States* v. *Fountain*, 840 F.2d 509, 513-515 (7th Cir. 1988) (claim that prosecutor presented hearsay evidence to the grand jury and failed to present exculpatory evidence); *United States* v. *Bucci*, 839 F.2d 825, 831-832 & n.6 (1st Cir. 1988) (claim that prosecutor failed to impeach perjurious testimony before the grand jury and offered false and inflammatory evidence); *Porter v. Wainwright*, 805 F.2d 930,

these courts have acknowledged, the grounds underlying *Mechanik*—the necessary implication of a conviction and the costs of a reversal on appeal—are not limited to cases in which alleged defects in grand jury proceedings are raised after a trial has begun.

Contrary to petitioner Lazar's assertion (88-250 Pet. 15-16), this Court's recent decision in *Bank of Nova Scotia* v. *United States*, No. 87-578 (June 22, 1988), does not suggest otherwise. There the Court held that an indictment may not be dismissed for prosecutorial misconduct occurring in grand jury proceedings absent a showing of prejudice to the defendant (slip op. 3). In assessing such claims, dismissal of the indictment is appropriate only " 'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations" (*id.*, slip op. 5 (quoting *Mechanik*, 475 U.S. at 78) (O'Connor, J., concurring)). Far from supporting petitioners' position, *Bank of Nova Scotia* reaffirmed

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941-942 (11th Cir. 1986), cert. denied, No. 86-6811 (June 8, 1987) (claim that grand juror was related to victim and that prosecutor wrongfully withheld that information); *United States* v. *Thomas*, 788 F.2d 1250, 1254 (7th Cir.), cert. denied, 479 U.S. 853 (1986) (claim that prosecutor asked the defendant improper questions before the grand jury, failed to present exculpatory evidence, and improperly advised the grand jury that the defendant's legal theories were incorrect). But see *United States* v. *Taylor*, 798 F.2d 1337, 1340 (10th Cir. 1986) (in context of ruling on interlocutory appeal, *Mechanik* held not to apply to violations of Rule 6 that affect "fundamental fairness" of criminal proceedings).

The courts of appeals have also held that *Mechanik* is not limited to violations of Fed. R. Crim. P. 6(d). Pet. App. 103a; *United States* v. *Hintzman*, 806 F.2d 840, 843 (8th Cir. 1986); *Porter* v. *Wainwright*, *supra*, 805 F.2d at 942; *United States* v. *Benjamin*, 812 F.2d 548, 552-553 (9th Cir. 1987).

the basic principle, applied in *Mechanik* and by the court of appeals in this case, that indictments or convictions should not be struck down solely as a means of disciplining prosecutors if the error has not prejudiced a defendant's substantial rights. Moreover, in *Bank of Nova Scotia*, the district court had dismissed an indictment when only one of five defendants had gone to trial on only one of the 27 counts. The case was not one in which there was "a verdict of guilty to serve as a basis for holding that no prejudice in the charging decision occurred * * *." *United States* v. *Kilpatrick*, 821 F.2d 1456, 1468 (10th Cir. 1987), aff'd *sub nom. Bank of Nova Scotia*, *supra*. In this case, there is such a verdict.

In any event, this is not an appropriate case in which to explore the reach of *Mechanik*. There is no conflict among the circuits on the issue petitioners raise. Moreover, neither court below found any violation of Rule 6. While petitioners complain of the district court's refusal to grant them a hearing on that issue, the court based its decision in part on petitioners' failure (except for Friedman's request for a severance) to "suggest[] any relief to which they would be entitled should [the court] succeed in fastening responsibility [for preindictment publicity] on any person." Pet. App. 6b-7b. Though numerous defendants have urged courts to dismiss indictments based on preindictment publicity, petitioners fail to cite a single decision (and we know of none) where an indictment has been dismissed on that ground.[6] Thus,

[6] In numerous cases, courts have declined to dismiss indictments as a remedy for preindictment publicity. *E.g.*, *Beck* v. *Washington*, 369 U.S. 541 (1962); *United States* v. *Burke*, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983); *United States* v. *Brien*, 617 F.2d 299, 313 (1st Cir.), cert. denied, 446 U.S. 919 (1980); *Silverthorne* v. *United States*,

this case presents only a hypothetical case of grand jury misconduct, of a type which to our knowledge has never before led to dismissal of an indictment, and which concededly did not affect the fairness of the trial.

Lazar urges that the decision below countenances "the existence of an unfettered prosecutorial power to defy and break the law while purportedly engaged in enforcing it" (88-250 Pet. 14), and results in a "total judicial incapacity to enforce Rule 6" (*id.* at 17). These rhetorical flourishes and others like them ignore the availability of remedies that this Court has recognized for grand jury misconduct. Violations of Rule 6(e) may subject a prosecutor to a finding of contempt,[7] as well as disciplinary sanctions and administrative sanctions within the Department of Justice through its Office of Professional Responsibility. A court may also chastise the prosecutor in a published opinion. See *Bank of Nova Scotia*, slip op. 12 (detailing possible sanctions for misconduct before a grand jury). These remedies "allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant" who has been convicted after a fair trial (*ibid.*).

Contrary to petitioner Friedman's suggestion, this case presents no question involving his right to a speedy trial in the district in which the crimes were

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400 F.2d 627, 632-634 (9th Cir. 1968); *United States* v. *Osborn*, 350 F.2d 497, 506-507 (6th Cir. 1965), aff'd, 385 U.S. 323 (1966); *Gorin* v. *United States*, 313 F.2d 641, 645 (1st Cir.), cert. denied, 374 U.S. 829 (1963); *United States* v. *Nunan*, 236 F.2d 576, 593 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957). See *United States* v. *Myers*, 510 F. Supp. 323, 325-326 (E.D.N.Y. 1980) (collecting cases).

[7] Despite their strident claims of misconduct, neither petitioners nor any of their co-defendants sought a contempt citation in the district court.

committed. See 88-278 Pet. i, 7-8. The district court did not find that an impartial jury could not be impanelled promptly in the Southern District of New York. To the contrary, it granted a change of venue because the defendants moved for one and the government did not object. The court stated that it would not have moved the trial had the government not consented. C.A. App. 1141. Thus, petitioners' contention that preindictment publicity "polluted the entire vicinage" (88-250 Pet. 15; see 88-278 Pet. i) is without foundation in the record.

2. Lazar next contends (88-250 Pet. 18-24) that the proof at trial showed multiple conspiracies rather than the single conspiracy charged in the indictment, that he was prejudiced by this alleged variance from the theory charged in the indictment, and that the district court erred in denying his motion for a severance.

All of these issues turn on whether there was sufficient evidence to convict Lazar of participating in the single conspiracy charged in the indictment. The district court instructed the jury on the issue of multiple conspiracies, and Lazar failed to object to that instruction. The court of appeals, reviewing for plain error, found that the district court's instruction was sufficient to ensure that the jury "could not have convicted Lazar of some other conspiracy" (Pet. App. 54a). Under these circumstances, the question whether the evidence established a single conspiracy or multiple conspiracies was a question of fact for the jury. *United States* v. *Alessi*, 638 F.2d 466, 472 (2d Cir. 1980); *United States* v. *Bagaric*, 706 F.2d 42, 63 n.18 (2d Cir.), cert. denied, 464 U.S. 840 (1983).

The court of appeals' analysis of the sufficiency of the government's evidence of a single conspiracy was

unexceptionable. The court acknowledged at the outset that proof of a single conspiracy requires evidence that the alleged co-conspirators "agreed on a 'common purpose' that sufficed to render their activities 'a single enterprise.'" Pet. App. 54a (quoting *United States* v. *Heinemann*, 801 F.2d 86, 92 (2d Cir. 1986), cert. denied, 479 U.S. 1094 (1987)). It then determined that the evidence satisfied this standard (Pet. App. 55a):

> Faced with abundant evidence that Lazar had paid bribes on behalf of two firms—Datacom and Miller & Rothman—the jury could easily have found that bribery was an important, if not essential, tool in ensuring success in obtaining contracts from the PVB. The jury could then have concluded that Lazar knew that he was not simply participating in isolated bribery conspiracies but rather in the broader conspiracy charged in the indictment, a conspiracy to operate the PVB for private gain through a pattern of racketeering activity.

Nor does the court of appeals' discussion of the requirements for a RICO conspiracy conviction raise any substantial issue of law. The court's observation that a "RICO conspiracy is * * * by definition broader than an ordinary conspiracy to commit a discrete crime such as bribery" (Pet. App. 55a) is not a "perversion" of traditional conspiracy doctrine (see Pet. 24). Rather, it is an acknowledgment of what is evident on the face of the statute. The object of a RICO conspiracy, which in this case was to conduct the affairs of the PVB through a pattern of racketeering activity, is broader than the object of a traditional conspiracy, which is to commit a conventional substantive offense. The scope of the forbidden conspiracy—*i.e.*, unlawful agreement—is cor-

respondingly broader. There is no conflict between this understanding of RICO and the Fifth Circuit's decision in *United States* v. *Sutherland*, 656 F.2d 1181 (1981), cert. denied, 455 U.S. 949 (1982). *In Sutherland*, the Fifth Circuit acknowledged that "[w]hat RICO does is to provide a new criminal objective by defining a new substantive crime." 656 F.2d at 1193. Further, analyzing the result in a prior case,[8] *Sutherland* made clear that defendants who could not have been tried together before RICO because they had not agreed to commit any particular crime could be named as co-defendants under RICO when "the evidence established an agreement to commit a substantive RICO offense, *i.e.*, an agreement to participate in an enterprise through a pattern of racketeering activity." *Ibid.* Both courts agree, therefore, that in this sense a RICO conspiracy is "broader" than a traditional conspiracy.

Under both the court of appeals' decision in this case and *Sutherland*, the issue is whether there was a conspiracy among all defendants to pursue the broad objective prohibited by RICO. Consistent with black-letter conspiracy law, this standard does not require the government to prove that there was "an actual agreement among the various conspirators, or even actual knowledge of each other, in order to establish a single conspiracy" (656 F.2d at 1190) or that each member has "conspire[d] directly with each other member" (Pet. App. 54a). Further, a conspiracy may be shown by evidence that "each

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[8] *United States v. Elliott*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978). There is no merit, therefore, to Lazar's contention that *Sutherland*'s handling *of Elliott* raises a conflict with the reliance by the court below on a quotation from it. See 88-250 Pet. 25.

defendant must necessarily have known that others were also conspiring to violate RICO." 656 F.2d at 1194; see Pet. App. 55a. *Sutherland* and *United States* v. *Cryan*, 490 F. Supp. 1234 (D.N.J.), aff'd mem., 636 F.2d 1211 (3d Cir. 1980), were cases in which no such showing had been made.[9] In this case, the court of appeals found the evidence sufficient to sustain such a finding. There is, therefore, no conflict in the governing legal principles applied below and in *Sutherland*.

3. Petitioner Friedman claims (88-278 Pet. 12-21) that the district court violated his Sixth Amendment right to confront the witnesses against him with its evidentiary rulings and its handling of his trial counsel's alleged conflicts of interest. Those claims, however, do not present any issue deserving of this Court's review. The court of appeals examined each of the alleged errors at length and concluded that none of them had any material impact on the trial.

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[9] In *Sutherland*, in fact, the government did not attempt to prove that each of two individuals who had separately bribed a single judge "agreed with each other to participate in a bribery scheme with [the judge]," nor did it contend "that the nature of each defendant's agreement with [the judge] was such that he or she must necessarily have known that others were also conspiring to commit racketeering offenses in the conduct of the Municipal Court." 656 F.2d at 1194. That second theory was the one presented to the jury in this case, on proper instructions, and the court of appeals found sufficient evidence to support it.

Similarly, in *Kotteakos v. United States*, 328 U.S. 750 (1946), it was conceded that the evidence supported only a finding of multiple conspiracies. The issue before the Court was whether the variance between that proof and the theory charged in the indictment required reversal.

With respect to the subpoenas for Lindenauer's psychiatric records, both the district court and the court of appeals conducted an in camera review of the responsive documents, and both came to the conclusion that "a true psychotherapist-patient relationship existed and that nothing in the psychotherapist's notes casts any doubt upon Lindenauer's ability to understand and relate the truth" (Pet. App. 74a). The court of appeals further found that "[t]he notes contain little, if any, material that would have been useful in cross-examining Lindenauer," and that the notes "could not have had even a marginal impact upon Lindenauer's credibility" (*ibid.*). The notes were therefore irrelevant and inadmissible at trial, and the subpoena was properly quashed. See *United States* v. *Nixon*, 418 U.S. 683, 700 (1974). Similarly, the evidence of Manes' misleading statements about his first suicide attempt "had no conceivable bearing upon the credibility of his statements to Lindenauer in furtherance of the conspiracy" (Pet. App. 71a). The district court thereby properly exercised its discretion under Fed. R. Evid. 403 to exclude the evidence of those statements. Those rulings turned on the assessments by the district court and the courts of appeals of the relevance and significance of particular evidence under the circumstances of this case, not on any legal issue of general application.

Friedman's claim that his counsel was ineffective due to conflicts of interest (88-278 Pet. 17-21) is also both without merit and entirely factbound. Friedman vigorously opposed the government's motion to disqualify his trial counsel, and the court of appeals' holding that his express waiver was knowing and intelligent was clearly justified. Further, while

Friedman now contends that he was unaware of all of the facts relevant to conflicts allegedly arising from Puccio's representation of Lebetkin and the possibility that Puccio also represented Borg when both were recorded in a conversation with Driesen, the court of appeals carefully examined those alleged conflicts and found that they had had no discernible effect on the cross-examination of any witness. See pp. 8-9, *supra*. In making that determination, the court applied the standards set forth in this Court's decision in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). The court's conclusion that Friedman showed neither a conflict nor an adverse effect on his lawyer's performance presents no issue of general importance.

4. Finally, Friedman contends (88-278 Pet. 21-23) that the invalidation under *McNally* of the racketeering act alleging mail fraud requires reversal of his RICO convictions, even though the jury returned a special verdict finding that Friedman committed four other racketeering acts of bribery as well. Numerous courts of appeals have rejected substantially the same contention and have held that a RICO conviction will be affirmed so long as it can be determined the jury properly found a defendant guilty of at least two acts of racketeering. See, *e.g.*, *United States* v. *Anderson*, 809 F.2d 1281, 1283-1285 (7th Cir. 1987); *United States* v. *Lopez*, 803 F.2d 969, 975-977 (9th Cir. 1986), cert. denied, 481 U.S. 1030 (1987); *United States* v. *Pepe*, 747 F.2d 632, 664 (11th Cir. 1984); *United States* v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States* v. *Peacock*, 654 F.2d 339, 348 (5th Cir. 1981), modified on other grounds, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983). The jury's special verdict in this case estab-

lished that it found that Friedman had engaged in a pattern of racketeering activity, consisting of more than the required number of predicate offenses, even without considering the racketeering act of mail fraud.[10]

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[10] Friedman's reliance (88-278 Pet. 23) on *United States* v. *Brown*, 583 F.2d 659, 669 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), is misplaced. In that case, the RICO counts alleged as acts of racketeering were four other substantive counts in the indictment. The Third Circuit held that reversal of the convictions on two of these substantive counts required reversal of the RICO counts as well, because it would be impossible to determine which of the counts the jury relied on in finding a pattern of racketeering activity. Here, however, use of a special verdict revealed that the jury relied on five separately alleged racketeering acts in finding a pattern of racketeering, and only one act of racketeering was reversed on appeal. The jury's valid determination of guilt as to four racketeering acts is more than sufficient to sustain its finding of a pattern of racketeering activity. See 18 U.S.C. 1961(5) (at least two racketeering acts required to meet requirement of pattern). In *United States* v. *Boffa*, 688 F.2d 919, 939 (3d Cir. 1982), cert. denied, 460 U.S. 1022 (1983), a case decided after *Brown*, the Third Circuit upheld RICO convictions based on precisely the same analysis that was applied in this case. In *Boffa*, as in this case, the court invalidated the mail fraud offenses that served as predicate acts against several of the defendants. Nonetheless, the court did not find it necessary to reverse those defendants' RICO convictions, because the government had established more than two other, valid predicate acts against each defendant, and the jury indicated, through a special verdict, that it found the defendants to have committed those predicate offenses.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1988

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 241699 60699